Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

PATRICK T. MANION, JR.

Petitioner,

v.

STEPHEN E. NAGIN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Where the arbitrator admitted that he did not apply the rules that the parties agreed would govern their arbitration, refused to advise Petitioner of what rules, if any, he did apply, enforced his own retroactively altered versions of the parties' agreements, ignored the undisputed facts in the record in favor of "facts" he invented, and imposed his own notions of industrial justice on Petitioner:

1. Did the Court of Appeals err when it did not review the arbitration award to determine if, in making it, the arbitrator was guilty of misconduct or other misbehavior by which the rights of Petitioner were prejudiced, as required by 9 U.S.C. §§10(a)(3) and 16?

2. Did the Court of Appeals err when it did not review the arbitration award to determine if, in making it, the arbitrator exceeded his powers or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made, as required 9 U.S.C. §§10(a)(4) and 16?

3. Did the Court of Appeals err when it did not review the arbitrator's denial of due process of law to Petitioner as required by 9 U.S.C. §§10(a)(3) and (4) and this Court's precedent?

PARTIES TO THE PROCEEDING

The Petitioner is Patrick T. Manion, Jr.

The Respondents are Boat Dealers' Alliance, Inc.; Stephen E. Nagin; Herzfeld & Rubin; Herzfeld & Rubin, P.C.; Nagin Gallop Figueredo, P.A.; Alex Stirling; Beaver Park Marina, Inc.; William G. Schaeffer, Boats, Inc.; Brian Olson; Donald C. Mackenzie; Bruce Marine; Bruce Crowder; Tom Crowder; Marineone Corp.; Tony Lumpkin; Cope Auto & Marine, Inc.; Kenneth Cope; Counce Marine, Inc.; Tandy Counce; Crocker's Marine, Inc.; Crocker & Co., L.L.C.; Morehead Marine, Inc.; Newland Kay Crocker; Terry G. Wilder; Custom Fiberglass Manufacturers, Inc.; Frank Franklin; "Just Add Water" Boats, Inc.; Tim Meyer; Killinger Marine Center, Inc.; Douglass Killinger; Norris Marine, LTD.; Tom Stidham; Phil Dill Boats, Inc.; Phil Dill, Jr.; Port Harbor Marine, Inc.; Robert Soucy; Russo's Marine Mart, Inc.; Lawrence J. Russo, Sr.; Summerville Marine, Inc.; Cleveland Wilson; Texas Marine & Brokerage, Inc.; Texas Marine of Houston, Inc.; Texas Marine of Clear Lake, Inc.; Michael Hebert.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Patrick T. Manion, Jr. respectfully petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Eighth Circuit in these consolidated cases.

OPINIONS BELOW

The opinions of United States Court of Appeals for the Eighth Circuit are reported at 394 F.3d 1062 (8th Cir. 2005), reprinted in the Appendix to the Petition ("Pet. App.") at 1a-13a, and 392 F.3d 294 (8th Cir. 2004), reprinted at Pet. App. 14a-26a. The Eighth Circuit's unpublished order denying Petitioner's Petition for Rehearing and for Rehearing En Banc, filed January 24, 2005, is reprinted at Pet. App. 106a.

The decisions of the district court are reported at 2004 WL 234402 (D.Minn., February 5, 2004), reprinted at Pet. App. 27a-50a, and 2003, WL 21459680 (D.Minn., June 20, 2003), reprinted at Pet. App. 51a-70a.

The arbitrator's Final Award in No. 65 160 00018 00 before the American Arbitration Association ("AAA"), dated February 21, 2003 is reprinted at Pet. App. 71a-79a, and his Findings of Fact, Conclusions of Law and Interim Arbitration Award ("Interim Award"), dated November 12, 2002 is reprinted at Pet. App. 80a-105a.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit issued its opinion in consolidated Case Numbers 04-1579 and 04-1705 on January 13, 2005, and its order denying Petitioner's Petitions for Rehearing and Rehearing in Banc in

Case Numbers 03-2869 and 03-2870 was entered on January 24, 2005.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. AMEND. V

No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

(Set forth verbatim at Pet. App. 107a).

9 U.S.C. § 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; . . . .

(Set forth verbatim at Pet. App. 107a-108a).

9 U.S.C. § 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration–

* * *

(3) where the arbitrators were guilty of misconduct . . . or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

* * *

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the

use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

(Set forth verbatim at Pet. App. 108a-109a).

9 U.S.C. § 16. Appeals

(a) An appeal may be taken from--

(1) an order–

* * *

(D) confirming . . . an award or partial award . . . .

(Set forth verbatim at Pet. App. 109a).

STATEMENT OF THE CASE

This petition seeks review of decisions of the Court of Appeals for the Eighth Circuit affirming decisions of the United States District Court for the District of Minnesota, which denied Petitioner's motions to vacate the arbitrator's Interim and Final arbitration awards (the "Awards") and dismissed Petitioner's claims against certain parties on collateral estoppel grounds based on the Awards.

The arbitration concerned whether Petitioner, the founder of Respondent Boat Dealers' Alliance, Inc. ("BDA"), had been improperly discharged under the Confidential Long Term Management Agreement ("Agreement"), Petitioner's employment contract with BDA, thereby wrongfully depriving Petitioner of the benefits under that Agreement. (The Agreement is reprinted in full at Pt. App.126a-142a).

Petitioner contends, without serious dispute, that the arbitrator did not apply the appropriate procedural rules or, in fact, any rules other than, perhaps, those of his own creation which he did not communicate to the parties.

Citing 9 U.S.C. § 10, the district court held that "[n]one of the statutory or extra-statutory grounds for vacating the . . . award exist." (Pet. App. at 57a). As support, the court referred to the AAA's National Rules for the Resolution of Employment Disputes ("Employment Rules"), which the parties' had agreed would govern their arbitration proceedings, stating that "Manion has not identified any specific Employment Rule that the Arbitrator violated or failed to apply," and that "Manion's failure to identify a particular Employment Rule not applied has also not been shown (sic) to prejudice Manion or to have affected the outcome of the arbitration." *Id.* at 62a.

In fact, however, Petitioner pointed out that the arbitrator had admitted in a transcribed conference ("Conference") that he did not apply the Employment Rules and refused to disclose what, if any, rules he did apply.[1] Petitioner also itemized several Employment Rules, including Employment Rule 22 discussed below, that the arbitrator did not apply and explained how a different outcome would have occurred had he applied them. *Id.*

---

[1] Appendix to Plaintiff-Appellants' Principal Brief on Appeals From the United States District Court for the District of Minnesota, Case Nos. 00-238 ADM/RLE and 02-370 ADM/RLE ("App. Rec.") at A-976-1014, 1425-40). All appellate record citations herein are to material in App. Rec. before the Eighth Circuit in consolidated Case Nos. 03-2869 and 03-2870.

The Court of Appeals had jurisdiction of the case pursuant to 9 U.S.C. § 16. That court declined to analyze the arbitrator's failure to apply the Employment Rules or to disclose what rules, if any, he did apply, on the ground that "the arbitrator did not prevent [Appellant] from presenting any of his evidence." (Pet. App. at 22a). In response to Petitioner's proof that the arbitrator's findings ignored the parties' agreements, invented facts, and imposed his own brand of industrial justice, the Court of Appeals stated: "[e]ssentially, Manion asks us to reweigh the evidence that was before the arbitrator, which our prior decisions make clear is not our prerogative." *Id.*

The district court also held that the Awards precluded Petitioner, on collateral estoppel grounds, from prosecuting claims against other defendants (Pet. App. at 36a-38a, 63a-66a), which decisions the circuit court also affirmed. (Pet. App. at 5a-8a, 24a-26a).

The facts material to consideration of the questions presented in this Petition are simple, few, and uncontroverted:

1. The AAA urged the parties to adopt its Employment Rules, and when they did those rules became a part of their arbitration agreement. (App. Rec. at A-460-61).

2. The Employment Rules were designed to ensure due process, in part, by providing that "[t]he parties shall bear the same burdens of proof and burdens of producing evidence as would apply if their claims and counterclaims had been brought in court." (App. Rec. at A-393).

3. After the arbitration hearing ("Hearing") the arbitrator issued an "Interim Award." Only after issuing the Interim Award did he reveal that he had applied no rules in making

that award. (Pet. App. at 116a). He also refused to disclose what rules, if any, he was using after he made the Interim Award. (Pet. App. at 114a-16a).

The legal principles that control the proper resolution of this case are also few, simple, and heretofore unanimously accepted:

1. The parties are entitled to determine the rules that govern their arbitration.

2. When an arbitrator does not follow those rules, he acts outside his authority and his award must be vacated.

3. When the arbitration concerns contractual rights, the terms of the contracts govern.

Freed of the impediments imposed by the Employment Rules and the legal principles that governed his conduct, the arbitrator:

1. Conducted the arbitration in accordance with secret rules or no rules at all.

2. Ignored the terms of the agreements and invented new ones that he found Petitioner breached.

3. Invented facts contrary to the undisputed facts in the record.

4. Based conclusions central to his award upon his notions of "universal principles" or "elemental truths."

5. Found that Petitioner was justifiably terminated for following instructions even though BDA reserved the right to

terminate him for *not* following the same instructions, thus elevating "Catch 22" to an appropriate decisional construct.

Had he followed accepted principles, the arbitrator would have applied agreed rules to undisputed facts, resulting in a materially different outcome. By accepting his "findings" without review of the arbitrator's unauthorized conduct, the lower courts obviated appeal as a meaningful right under the Federal Arbitration Act ("FAA"), 9 U.S.C §§ 1 et seq. These decisions will have a dramatic and, unless reversed, devastating impact on arbitration as a legitimate dispute resolution device.

As amplified below, the Court should grant certiorari in this case to restore potency to its previous pronouncements that the rules selected by the parties govern in arbitration, that the contracts between the parties control, that due process principles must inform and govern arbitration proceedings, and that arbitration awards issued in disregard of these rules are subject to meaningful review by the courts.

ARGUMENT

A. The Arbitrator Exceeded the Scope of His Authority.

The FAA requires that arbitrations be conducted "in accordance with the terms of the [parties'] agreement." 9 U.S.C. § 3. The terms include the rules that the parties choose to govern their proceedings. *Volt Info. Sciences, Inc. v. Board of Trustees,* 489 U.S. 468, 479 (1989); *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 37-41 (1987).

Prior to the arbitration hearing ("Hearing"), the parties agreed that the AAA's Employment Rules would govern. These rules "include[] procedures which ensure due process in . . . [the] arbitration of employment disputes." (App. Rec. at A-377). As the AAA advised, the rules "provide the most up-to-date procedures by the [AAA] to ensure due process in the resolution of . . . employment disputes." (App. Rec. at A-460).

> [The Employment Rules] reflect the guidelines outlined in the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship ["*Protocol*"], adopted last year by a committee composed of the AAA, the American Bar Association, the American Civil Liberties Union, the National Academy of Arbitrators, the National Employment Lawyers Association and a number of other organizations.[2]

Id. The AAA "strongly recommend[ed]" that the parties agree to be governed by the Employment Rules, and they did so. (App. Rec. at A-461). They then selected the arbitrator from the AAA's Employment Dispute Resolution Roster, a list of those trained to apply these rules. (App. Rec. at A-483, 488, 571). Shortly thereafter, BDA advised the AAA and Petitioner of its intent to "properly comply" with these rules. (App. Rec. at A-481).

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[2] The AAA Employment Rules themselves are the result of a process in which management, labor and other diverse interests participated. *Parilla v. IAP Worldwide Services, VI, Inc.*, 368 F.3d 269, 280 n.10 (3rd Cir. 2004).

The due process emphasis in the Employment Rules mirrors the Court's view that, due to the significant interests at stake, fair procedures are required in quasi-judicial proceedings involving employee termination issues. The Court has long recognized that a person's "interest in continued employment is without doubt an important interest that ought not be interrupted without substantial justification." *FDIC v. Mallen*, 486 U.S. 230, 243 (1988), quoting *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 263 (1987). *See also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543 (1985). Given the significance of such interests, the question of substantial justification must be determined by an arbitrator in good faith and in accord with basic notions of due process. The decision in *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 617-18 (1992), holding that arbitrators are subject to the command of due process, supports this view. Finally, the Court has also recognized that specialized rules can further these important interests. In *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), for example, the Court explained that both the law and the parties expect arbitrators with expertise in applying specialized rules to promote a fair and expeditious resolution of controversies. 537 U.S. at 85.

Before the Hearing, the arbitrator was advised that the AAA Employment Rules governed. (App. Rec. at A-498). However, during the Conference held shortly after he issued his Interim Award, the arbitrator denied knowing that those rules were to govern. (Pet. App. at 114a-18a; App. Rec. at A-3795-3800). More remarkably, he admitted that "the [Interim] award was issued without reference to one set of rules or another." *Id.* He then refused to disclose what, if any, rules he was using after he issued the Interim Award. *Id.*

Had the arbitrator applied the Employment Rules, the outcome of the arbitration would have been far different. This is demonstrated by a review of BDA's evidence against the demands of AAA Employment Rule 22. That rule provides that "[t]he parties shall bear the same burdens of proof and burdens of producing evidence as would apply if their claims and counterclaims had been brought in court." (App. Rec. at A-393). The AAA has admonished arbitrators to pay "particular attention" to this rule. (App. Rec. at A-549). "'It is plain that where the burden of proof lies may be decisive of the outcome.'" *Armstrong v. Manzo*, 380 U.S. 545, 551-552 (1965) (quoting *Speiser v. Randall*, 357 U.S. 513, 525 (1958)). See also, 9 J. WIGMORE, EVIDENCE § 2486 (J. Chadbourn rev. ed.1981) (where fairness so requires, burden of proof of a particular fact may be assigned to the "party who presumably has peculiar means of knowledge" of the fact).

The terms of the Agreement dovetail with Employment Rule 22. The Agreement permitted BDA to terminate Manion for "proven . . . bad faith conduct which is against the interests of the corporation (malfeasance)."[3] (Pet App. at 130a). As the charging party, BDA had the burden of proof. *Ross v. Garner Printing Co.*, 285 F.3d 1106, 1113 (8th Cir. 2002). Florida law, which applied pursuant to the Agreement, defines "bad faith" as "a sinister design equating with a fraudulent purpose." *Howard v. Metcalf*, 487 So.2d 43, 46 (Fla.App. 2 Dist. 1986).

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[3] While the Agreement sets forth additional termination criteria, the arbitrator found that BDA did not prove them, a finding unchallenged by BDA and now final. (Pet. App. at 87a, 91a, 98a; 9 U.S.C. §12; *Fradella v. Petricca*, 183 F.3d 17 (1st Cir. 1999).

Although the arbitrator acted in excess of his authority when he admittedly did not apply the Employment Rules, neither the district court nor the circuit court made any effort to determine if BDA met "the burdens of proof and burden of producing evidence" that "would apply if [its] claims and counterclaims had been brought in court" as requried by Employment Rule 22. Had either done so, the arbitrator's three grounds for finding Manion in bad faith would have been revealed as untethered to the terms of the Agreement, BDA's By-Laws, or the undisputed facts in the Record.

B. The Arbitrator Rewrote the Agreement.

The arbitrator found Manion in bad faith for not disclosing to Members BDA's Note payable to Manion for expenses he incurred during BDA's 9-month start-up phase. (Pet. App. at 90a-91a). Yet, Manion had indisputable authority to loan money to BDA for start-up expenses and to receive the Note representing his loans. (App. Rec. at A-03821, 03824). After all, from its inception in mid-1995 until March 1996, he was BDA's founder, sole director, and Executive Director. (Pet. App. at 83a-84a; 91a-92a, 93a, 94a). At the first Member meeting on March 6, 1996, they unanimously approved the Agreement, thereby reaffirming Manion's position as Executive Director and authorizing – without further condition – his reimbursement for expenses "incurred on behalf of BDA" from July 1, 1995, forward (*i.e.*, the amount evidenced by BDA's Note). (Pet. App. at 83a-84a, 94a; App. Rec. A-00158). Thus, before BDA had Members, it was obligated on its Note – an obligation the Members ratified. As any amendment to that Agreement had to be signed by Manion (Pet. App. at 139a), and no amendment

exists, the arbitrator had no basis to restrict Manion's contractual right to reimbursement.[4]

C. The Arbitrator Invented Facts.

The arbitrator next found Manion in bad faith for "not deduct[ing] operating expenses in calculating his own [1998] compensation." (Pet. App. at 88a). However, it was undisputed that Manion never computed his compensation, for that was done by BDA's accountants, bookkeepers, or Controller. (App. Rec. at A-01210-11, 03028, 00765, 00771, 00778, 00782). Concerning the erroneous 1998 computation, BDA merely proved that its bookkeeper – not Manion – made it. (App. Rec. at A-1209-14). BDA further proved that Manion believed his 1998 compensation had been accurately computed until he learned of the bookkeeper's error at which point he asked BDA's accountants to correct it. (App. Rec. at A-1211, 2325). Thus, the arbitrator simply invented the notion that Manion computed his own 1998 compensation.

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[4] Further, the arbitrator did not simply ignore, he retroactively altered, the Members' undisputed instruction that Manion provide BDA's financial statements to the Executive Committee – not to the Members. (App. Rec. at A-1983-84). Nor did the arbitrator determine that BDA's Directors had not received financial statements that disclosed the Note. (Pet. App. at 89a). In fact, BDA's independent accountant reported the Note in financial statements he prepared on a monthly basis from July 1995, when the Note was created, to April 1997, when it was paid. (App. Rec. at A-342-347,627-48, 653-90). Finally, the President and Chief Financial Officer received the financial statements at every Executive Committee meeting they attended – and they attended them all. (App. Rec. at A-1630, 1635-36, 1638-39, 3600-01, 3608-09, 3636).

D. The Arbitrator Disregarded the Agreement and By-Laws and Imposed his Own Brand of Industrial Justice on Petitioner.

Finally, the arbitrator found Manion in bad faith for failing to deduct operating expenses from Member dividends. (Pet. App. at 88a). However, the By-Laws permitted only Members (and Manion was not a Member) to decide how to allocate expenses among themselves – a decision they never made. (App. Rec. at A-1717, 1745, 2037-41; 1744-45). Because the By-Laws defined as an allocation any method Manion might have used to deduct expenses from Member dividends, the condition precedent for deductions by him never existed. (Pet. App. at 143a). Manion was also insulated from responsibility for making that Member decision by the Agreement, which provided that he "shall not be expected to perform . . . any . . . duties relative to exercising ultimate responsibility which rests with the . . . [Members] pursuant to the BDA By-Laws." (Pet. App. at 133a-34a).

The arbitrator recognized the Hobson's choice that the Executive Committee presented to Manion when it instructed him to pay the dividends. (App. Rec. at A-701, 1728-29). For, as only Members could "decide how they want[ed] to allocate expenses," (App. Rec. at A-1717, 1745, 2037-38), BDA also had the right to fire Manion if he made that decision by deducting expenses from Member dividends – as the President testified. (App. Rec. at A-1757-58). In sum, the arbitrator found Manion in "bad faith" for making the "wrong" choice, which is to say, for complying with the letter and spirit of the By-Laws and the Agreement. And, even though BDA acknowledged that the Agreement required "good faith and fair dealing," (App. Rec. at A-728), the arbitrator stated:

> It was argued that Manion was in a Catch 22 situation and that he could have been discharged for failing to send out patron's net dividends without the deduction of expenses because that is what the Directors had told him to do. *I believe that if he had refused to send out the dividends and been discharged for failing to do so in the face of his protest that the Directors had to figure out how to allocate expenses before the dividends could be computed, he would have had a wrongful discharge claim of merit.*

Pet. App. at 104a) (emphasis added). Typically, such a fundamentally unfair result is not merely reviewed, it is vacated. *See Beardsly v. Chicago & N. Western Transp. Co.*, 850 F.2d 1255, 1269 (8th Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989).

Finally, the arbitrator attempted to buttress his conclusion with his own brand of industrial justice, stating in the Interim Award, as follows:

> I believe it to be a universal principle understood by everyone who is a member of a cooperative association or an employee of a cooperative association or a director of a cooperative association that the expenses of doing business must be considered before computation of net dividends.

(Pet. App. at 103a-104a). However, the arbitrator's "universal principle" could not alter Manion's rights or add to his duties under the Agreement or the By-Laws. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

WHY THE WRIT SHOULD BE GRANTED

Over the past twenty years, arbitration as a means of resolving employment, health care, and financial disputes, among others, has mushroomed. As a result, arbitrators exercise powers that significantly impact the livelihoods, health, and fortunes of millions of Americans. Yet, even as arbitration's role has expanded, the perception has grown that the system is unfair. Whether or not that is so, perception is often reality. One counter-weight to this perception has been the development by the AAA and others of special rules to ensure greater fairness – as the Employment Rules' emphasis on due process attests.[5] Parties are entitled to select such rules to govern their arbitration as part of the *quid pro quo* for surrendering important rights, such as the right to trial by jury. If that right is not strictly enforced, however, the pendulum will continue to swing against arbitration for, in the United States at least, pervasive, but inherently unfair, systems are usually short-lived.

The well-documented facts of the case provide the Court with the opportunity to avouch the basic tenets of the FAA: (1) arbitration is voluntary; (2) the parties' agreements control; and (3) courts must enforce those agreements. Here, in selecting the Employment Rules, the parties limited the arbitrator's powers by imposing a burden of proof that BDA was required to meet. Therefore, the issue is not, as the

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[5] As the court in *Jenkins v. First American Cash Advance of Georgia, LLC*, 400 F.3d 868, 879-80 (11th Cir. 2005), observed, the AAA has also developed the Consumer Due Process Protocol to protect consumers and ensure they are treated equitably in arbitration. *See* AMERICAN ARBITRATION ASSOCIATION, CONSUMER DUE PROCESS PROTOCOL, (Apr. 17, 1998), at http://www.adr.org/sp.asp?id=22019.

Court of Appeals said, whether Manion had the opportunity to *present* evidence; the issue is Manion's right to have BDA's evidence, if any, *tested* in a fair-minded manner against a judicially-accepted standard.

By disregarding the rules and the parties' agreements, the arbitrator denied Manion his rights thereunder, while retroactively imposing on him duties he neither knew of nor agreed to. When undisputed facts confirmed Manion's good faith, the arbitrator invented contrary facts and "found" bad faith. The arbitrator not only recognized, he endorsed, BDA"s "Catch 22" ploy. Lastly, he imposed his own brand of industrial justice on Manion – contrary to the Employment Rules, the Agreement, and the ByLaws. Much of his misconduct cannot be seriously disputed, for it is evidenced by transcripts of the Hearing and the Conference, as well as the Awards. Unlike a typical arbitration, therefore, this case presents a well-documented record of extreme and unjustified arbitral misconduct. It further confirms the extraordinary nature of the circuit court's unparalleled decision not to review that misconduct.

Because the Court of Appeals' decision directly challenges the FAA's requirement that an arbitration award issued in excess of an arbitrator's powers be reviewed by the lower courts, this case also presents questions fundamental to arbitration law under that statute. Contrary to 9 U.S.C. § 3, the arbitration did not proceed "in accordance with the terms of the [parties'] agreements." Contrary to 9 U.S.C. § 10(a)(4), the arbitrator "exceeded [his] powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." Congress adopted such provisions to "protect[] against arbitrators who abuse or exceed their powers or willfully misconstrue their mandate under the governing law." *Thomas*

v. Union Carbide Agr. Products Co., 473 U.S. 568, 601-02 (1985) (citing *Enterprise Wheel,* 363 U.S. at 597). Because the FAA commits such questions to the district courts and permits appeals of their decisions to the circuit court under 9 U.S.C. § 16, the Court of Appeals committed serious error by refusing to engage in the review where, as here, the requisite misconduct is shown.

In addition to disregarding the FAA, the circuit court's decision also conflicts with this Court's precedent concerning the scope of judicial review of arbitration awards. Specifically, it conflicts with *Misco,* that an award is immunized from review only if the arbitrator construes the contract in good faith and while "*acting within the scope of his authority.*" *Misco*, 484 U.S. at 37-41 (emphasis added). It also conflicts with *Volt,* where the Court stated:

> [I]t does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself. Indeed, such a result would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms. Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure the arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate], so too may they specify by contract the rules under which that arbitration may be conducted. Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA . . . . By permitting the courts to "rigorously enforce" such agreements according to their terms we give effect to

> the contractual rights and expectations of the parties, without doing violence to the policies behind by the FAA.

Volt, 489 U.S. at 479 (citations omitted). *See also*, *Misco*, 484 U.S. at 37-41 (parties are "free to set the procedural rules for arbitrators to follow."); *Green Tree Fin. Corp.- Alabama v. Randolph*, 531 U.S. 79, 94-95 (2000) (Ginsburg, J., concurring) (explaining that the drafter of the contract could have relied on the AAA's Consumer Arbitration Rules to ensure the claims are arbitrated in a particular manner).

On the substantive level, the Court of Appeals' decision conflicts with *Enterprise Wheel*, the seminal decision permitting review of an award where the arbitrator ignores the plain language of the contract, where the award does not draw its essence from the parties' agreement, or where the arbitrator imposes his "own brand of industrial justice" on the parties. 363 U.S. at 597. Nor can it be gainsaid that an arbitrator who invents "facts" contrary to undisputed proof violates principles of due process so basic that review is also mandated. *Concrete Pipe & Products*, 508 U.S. at 617-18.[6]

Other courts have recognized that indifference to enforcing the rules chosen by the parties would seriously undermine arbitration as a legitimate forum. In *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 680 (6th Cir. 2003), the court enforced the rules selected by the parties on the ground that

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[6] *See Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 382-84 (2002) (collecting statutes and rules that require an arbitrator to base his or her decisions on proven facts); *Machinists Workers v. Northwest Airlines, Inc.*, 858 F.2d 427, 430 (8th Cir. 1988) (award "without foundation in reason or fact" must be vacated).

any other approach would "undermine confidence in the integrity of arbitration as a legitimate forum." Prior to its ruling in this case, the Court of Appeals appeared to share these important concerns. Thus, in *Olson v. Merril, Lynch, Pierce, Fenner & Smith, Inc.*, 51 F.3d 157, 160 (8th Cir. 1995), pursuant to 9 U.S.C. § 10(a)(2), the court vacated an award where the arbitrator had not applied the governing rules, holding that this result was "especially fair" as it "realizes the terms" of the parties' agreement. The circuit court's decision in this case subverts the law's expectations of the arbitrator's role, the modest rights parties expect in return for surrendering important constitutional rights, and confidence in the integrity of arbitration as a legitimate forum.

The Court of Appeals' extreme departure from well-settled principles is in sharp contrast to rulings by other courts when faced with similar, albeit far less egregious, circumstances. Thus, in *Lindland v. U.S. Wrestling Ass'n*, 227 F.3d 1000 (7th Cir. 2000), the arbitrator ignored AAA Commercial Rule 48, which provides an "arbitrator is not empowered to redetermine the merits of any claim already decided." *Id.* at 1004. The Seventh Circuit Court of Appeals refused to confirm the award, holding that arbitrators:

> are bound by the contracts and other rules that give them power to act. An arbitrator who throws aside those rules and implements his "own brand of industrial justice" oversteps his powers, and the resulting award must be set aside . . . . Arbitrators . . . are authorized to resolve disputes under contracts and rules, not to declare how the world should work in the large.

Id.

In *Lindland* the court observed that the arbitrator "did not misinterpret Rule 48; he decided to ignore it utterly." *Id. See also Western Employers Ins. Co. v. Jefferies & Co.*, 958 F.2d 258, 261-62 (9th Cir. 1992); *Rainwater v. National Home Ins. Co.*, 944 F.2d 190, 194 (4th Cir. 1991); *Szuts v. Dean Witter Reynolds, Inc.*, 931 F.2d 830, 831 (11th Cir.1991). Here, the arbitrator went further, for he ignored the Employment Rules, the FAA, *and* this Court's precedent – utterly.

Petitioner further submits that where, as here, an arbitrator denies a party elemental due process, review is appropriate. By accepting his quasi-judicial position, the arbitrator became subject to the command of due process. *Concrete Pipe,* 508 U.S. at 617-18. Accordingly, he was required to meet the "stringent rule" that the justice he dispensed "must satisfy the appearance of justice." *Id.*

The arbitrator's conduct does not approach any known concept of due process. See *e.g., Bay View, Inc. v. United States*, 278 F.3d 1259, 1267 (Fed. Cir. 2001) ("[i]t violates fundamental concepts of justice and fairness, to change the rules after the game is played."), *cert. denied*, 537 U.S. 826 (2002); *Coffman v. Trickey*, 884 F.2d 1057, 1061 (8th Cir.) (where hearing officer did not know the rules, due process right of fair warning not satisfied), *cert denied*, 494 U.S. 1056 (1990); *Lee County Branch of NAACP v. City of Opelika*, 748 F.2d 1473, 1481 (5th Cir.1984) (due process mandates that when rules are changed, players must be given full and fair opportunity to play by the new rules); *Devine v. Sutermeister*, 724 F.2d 1558, 1564 (Fed. Cir. 1983) ("[f]undamental fairness requires that, at the very least, the agreement reached by the parties is not simply to be ignored").

Finally, while the statutory grounds for review place extreme limits on a court's review authority, those limits are

still designed to preserve due process. *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987, 997-98 (9th Cir. 2003).

CONCLUSION

"Quis custodiet ipsos Custodes?" Juvenal inquired.[7] When, as here, a court of appeals fails to guard rights to due process, the integrity of a Congressional statute, or Supreme Court precedent, the U.S. Constitution responds that this Court becomes the last bulwark against disorder.

In its decisions defining the arbitrator's role under the FAA, the Court has taken an approach opposite to that of the Court of Appeals. The Court's pole stars have been the intent Congress, as expressed in the FAA, and the Constitution's guarantee of due process of law. By granting certiorari in *Misco, Volt, Howsam, Enterprise Wheel, Concrete Pipe* and *Thomas,* the Court decided that the questions there presented were significant. So too, where the jurisprudence of those cases is challenged, their principles must again be enforced.

By abandoning that precedent, the Court of Appeals' decision releases arbitrators from their duty to follow the rules, permitting capricious awards untethered to agreements or proof. Expectations that arbitrators will use their expertise to fairly resolve disputes thereby become a trap for the parties. When courts are indifferent to their duties under the FAA and the Constitution, arbitrators gain unchecked power to deny due process, disregard the governing rules, and ignore the parties' agreements, while arbitration degenerates into an

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[7] JUVENAL. Satire VI, in THE SATIRES 51 (Rev. Lewis Evins trans.) (1872) ("Who is to guard the guards themselves?").

extrajudicial free for all. By the breadth of its challenge to this Court's precedent, the Court of Appeals' decision confirms the importance of this case to the course of arbitration law in this country.

Although Congress intended that courts protect parties from arbitrators who abuse or exceed their powers or willfully misconstrue their mandate, under the Court of Appeals' decision such conduct becomes the order of the day. To date, neither Congress nor this Court has taken the direction favored by the Court of Appeals. If a new course is to be set, this Court, and none other, should chart it.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 04-1579, No. 04-1705

[Filed January 13, 2005]

Patrick T. Manion, Jr.,
Appellant,

v.

Stephen E. Nagin; Herzfeld & Rubin; Herzfeld & Rubin, P.C.; Nagin Gallop Figueredo, P.A.,
Appellees,

Boat Dealers' Alliance, Inc.,
Defendant.

Patrick T. Manion, Jr.,
Plaintiff,

Stephen E. Nagin; Herzfeld & Rubin; Herzfeld & Rubin, P.C.; Nagin Gallop Figueredo, P.A.,
Defendants-Appellees,

v.

Boat Dealers' Alliance, Inc.,)
Defendant - Appellant.)
)

Appeals from the United States District Court
for the District of Minnesota

Before MURPHY, HEANEY, and BEAM, Circuit Judges.

OPINION

HEANEY, Circuit Judge.

Patrick T. Manion, Jr., sued attorney Stephen E. Nagin, and the law firms of Herzfeld & Rubin, Herzfeld & Rubin, P.C., and Nagin Gallop Figueredo, P.A., for breach of fiduciary duty, negligence, and tortious interference with contract stemming from Nagin's conduct in the creation and representation of the Boat Dealers' Alliance, Inc. (BDA).[1] The district court[2] dismissed Manion's suit, and we affirm.

BACKGROUND

Because this matter reaches us following a motion to dismiss the complaint, we construe the pleadings liberally in favor of Manion and accept the allegations in his complaint as true. *Wisdom v. First Midwest Bank*, 167 F.3d 402, 406 (8th

[1] Manion's companion suit against BDA and its members is also the subject of an appeal. We have issued a separate decision in that case. *See Manion v. Nagin*, 392 F.3d 294, 2004 U.S. App. LEXIS 26100, Nos. 03-2869 & 03-2870 (8th Cir. Dec. 16, 2004).

[2] The Honorable Ann D. Montgomery, United States District Judge for the District of Minnesota.

Cir. 1999).[3] Patrick Manion worked for many years in the pleasure boat industry. In 1995, he came up with a plan to organize, own, and operate an entity made up of retail boat dealers, who would use their buying power to purchase marine equipment at significant discounts.

Stephen Nagin held himself out as an attorney who was experienced in representing buying groups. When Manion contacted Nagin about Manion's idea to create his marine buying group, Nagin boasted that he was a "world class lawyer" working at a "world class law firm." (Appellant's App. at 32.) He claimed to be one of the few lawyers in the country who had expertise in organizing buying groups. In the spring of 1995, Nagin agreed to represent Manion in creating and running BDA. Nagin told Manion that he would charge $300 per hour for his work on BDA, but eventually the two agreed that Nagin would charge $150 an hour but also receive ten percent of BDA's preferred stock. Owners of the preferred stock received ten percent of BDA's annual distributable income. Until Nagin suggested he take an ownership interest in BDA's preferred stock, Manion intended to be the sole owner of it.

Nagin incorporated BDA in Florida. Manion questioned whether it was wise to incorporate in this venue, but Nagin shrugged off Manion's concern, stating "I am the attorney. I am the one who is well versed in this. Let me do my job and

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[3] The district court properly considered the motion as one to dismiss rather than one for summary judgment because the only matters beyond the pleadings relied upon by the district court were matters of public record. *Accord Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999) (noting that district court may consider public records from other proceedings in ruling on a motion to dismiss).

you do yours." (Appellant's App. at 34.) When Nagin prepared BDA's By-Laws, Manion noticed that preferred stock shareholders could only vote for certain changes in the By-Laws, while common stock shareholders had unrestricted voting rights. He questioned Nagin about how he, owning only preferred stock, could control BDA if he could not vote on general matters. Nagin advised Manion that he maintained control over BDA because the value of his preferred stock was so much greater than the value of common stock, and because of a Management Agreement that Nagin had drafted to serve as Manion's employment contract with BDA. Nagin assured Manion that the Management Agreement precluded BDA from removing Manion from his position as executive director for any reason for twenty years.

By 1996, Nagin had become unhappy with his fee structure. He wrote to Manion, asserting that he was not receiving the amount of compensation they had anticipated in crafting the fee agreement. The two agreed on a new fee structure, whereby Nagin received a greater percentage of the preferred stock dividends. Manion was the only other shareholder of the preferred stock, meaning that the increased legal fees would be paid from monies originally due to Manion.

On February 13, 1999, BDA held a special meeting at which BDA terminated Manion. In arbitration proceedings related to Manion's claims of wrongful termination, BDA successfully argued that its termination of Manion was proper because he acted in bad faith against the interests of BDA. The district court confirmed the arbitration award, and this court affirmed. *See Manion v. Nagin*, 2004 U.S. App. LEXIS 26100, Nos. 03-2869 & 03-2870 (8th Cir. Dec. 16, 2004). Manion, still a majority shareholder of the preferred stock, decided to attend BDA's April 10, 1999 meeting. At the

meeting, Manion learned that Nagin had asked BDA's Finance Committee to search for additional grounds to justify BDA's termination of Manion. When Manion learned about this, he asked Nagin who he was representing. Nagin responded that he represented BDA. Up until this point, Nagin had not told Manion that he did not represent Manion, and Manion considered Nagin to be his lawyer.

Manion filed suit against BDA, its individual members, Nagin, and his law firms. The district court directed arbitration with regard to Manion's complaint against BDA and its members pursuant to the terms of his contract, and stayed his claims against Nagin and the law firms pending the outcome of the arbitration. This court affirmed. *Manion v. Nagin*, 255 F.3d 535 (8th Cir. 2001). Following the arbitrator's decision, Nagin and the law firms moved to dismiss Manion's complaint, contending that the claims were either legally deficient, collaterally estopped, or barred for failure to comply with a Minnesota statute concerning legal malpractice claims. The district court dismissed Manion's complaint, and this appeal followed.

ANALYSIS

The district court found that Manion's tortious interference with contract claim and some of his negligence claims were barred by the doctrine of collateral estoppel, also known as issue preclusion. "We look to state law in determining whether to apply issue preclusion," *Liberty Mut. Ins. Co. v. FAG Bearings Co.*, 335 F.3d 752, 758 (8th Cir. 2003), and review the district court's ruling on the matter de novo, *Nat'l Union Fire Ins. Co. v. Terra Indus., Inc.*, 346 F.3d 1160, 1164 (8th Cir. 2003). A party is precluded from litigating an issue if the following conditions are met: 1) the issue to be litigated is identical to one already decided in a

prior adjudication; 2) the earlier case resulted in a final judgment on the merits; 3) the party raising the issue was a party to or in privity with a party to the prior case; and 4) the party was given a full and fair opportunity to be heard on the issue. *Crumley v. City of St. Paul*, 324 F.3d 1003, 1006 (8th Cir. 2003) (stating Minnesota legal standard for the doctrine of collateral estoppel); *Cmty. Bank of Homestead v. Torcise*, 162 F.3d 1084, 1086-87 & n.7 (11th Cir. 1998) (recognizing similar elements under Florida substantive law).[4]

Manion first argues that the district court erred by relying on findings in his related arbitration proceeding against BDA and its members when deciding if any of his claims were collaterally estopped against Nagin and the law firms. We disagree. An arbitration award counts as a final judgment for collateral estoppel purposes. *Wellons, Inc. v. T.E. Ibberson Co.*, 869 F.2d 1166, 1168-69 (8th Cir. 1989). While Manion complains that he did not get a full and fair hearing in the arbitration, we have considered this argument at length in the related appeal of *Manion v. Nagin*, 2004 U.S. App. LEXIS 26100, Nos. 03-2869 & 03-2870 (8th Cir. Dec. 16, 2004), and rejected Manion's position.

Manion's tortious interference with contract claim stems from his allegation that Nagin interfered with his employment rights under his Management Agreement. In order to prove tortious interference, Manion is required to show that he had valid contract rights which Nagin knew about and procured another party to breach without justification, and that he was damaged by the breach. *Guercio v. Prod. Automation Corp.*,

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[4] There is a question as to whether Minnesota or Florida law governs Manion's claims. We have included citations to both, as the result is the same under either state's law.

664 N.W.2d 379, 389 (Minn. Ct. App. 2003); *accord Salit v. Ruden, McClosky, Smith, Schuster, & Russell, P.A.*, 742 So. 2d 381, 385-86 (Fla. Dist. Ct. App. 1999) (stating that under Florida law, a plaintiff alleging tortious interference must prove the existence of a business relationship accompanied by legally enforceable rights, the intentional and unjustified interference with that relationship, and damages). Manion arbitrated the issue of whether BDA breached his Management Agreement without justification. The arbitrator interpreted the contract to permit BDA to terminate Manion if he was grossly negligent or acted in bad faith. Finding that Manion demonstrated bad faith in three instances where he failed to act in BDA's financial interest, the arbitrator held that BDA was justified in terminating Manion's employment contract.

The arbitration decision precludes Manion's tortious interference with contract claim against Nagin and his firms. Manion alleged that Nagin assisted BDA in breaching Manion's contract. But, as the arbitrator found, BDA was justified in terminating Manion's contract because of his bad faith conduct. To sustain his claim, Manion must prove that Nagin assisted BDA in terminating him without justification, *Guercio*, 664 N.W.2d at 389; *Salit*, 742 So. 2d at 385-86, and he cannot do so here on account of the arbitrator's contrary ruling.

The same analysis applies to the negligence claims dismissed by the district court on collateral estoppel grounds. Manion alleged that Nagin was negligent in not protecting Manion's ownership rights to his preferred stock, and that he was damaged by the loss of the stock. The arbitrator, however, found that Manion was still the rightful owner of the preferred stock and entitled to all benefits attendant to ownership. Since Manion's claimed damages flowed from his

alleged loss of the stock, and the arbitrator found that Manion never in fact lost his stock, he has suffered no injury. Proof of damages or a cognizable injury is essential to a negligence claim. *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995); *Fla. Power & Light Co. v. Lively*, 465 So. 2d 1270, 1273 (Fla. Dist. Ct. App. 1985). Manion cannot establish the essential elements of negligence for his action concerning his preferred stock.

The district court dismissed the remainder of Manion's suit, which alleged negligence and the breach of fiduciary duty related to Nagin's legal work, because it found he failed to state a claim. The lynchpin of this holding was the district court's determination that Nagin was never working as Manion's personal lawyer, and thus owed Manion no duty whatsoever.

To maintain a claim for negligence deriving from legal malpractice, the plaintiff must demonstrate the existence of an attorney-client relationship. *Wartnick v. Moss & Barnett*, 490 N.W.2d 108, 112 (Minn. 1992); *Horowitz v. Laske*, 855 So. 2d 169, 173 (Fla. Dist. Ct. App. 2003). Similarly, an attorney undertaking an attorney-client relationship assumes fiduciary duties, the breach of which may be actionable. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002); *Behr v. Foreman*, 824 So. 2d 222, 223-24 (Fla. Dist. Ct. App. 2002).

In Minnesota, an attorney-client relationship can be created through contract or tort theory. *Gramling v. Mem'l Blood Ctrs.*, 601 N.W.2d 457, 459 (Minn. Ct. App. 1999). Under the former, the plaintiff must show the creation of the relationship through either express or implied contract. *Id.* The tort theory of representation recognizes the existence of an attorney-client relationship "whenever an individual seeks

and receives legal advice from an attorney in circumstances in which a reasonable person would rely on such advice." *Id.* at 460. Likewise, in Florida the test for determining if an attorney-client relationship exists depends on the client's belief that he is consulting with an attorney for the manifest purpose of obtaining legal advice. *Fla. Bar v. Beach*, 675 So. 2d 106, 109 (Fla. 1996). In both states, though, an individual's subjective expectation that a lawyer will represent the person is insufficient as a matter of law to create the relationship. *Id.*; *Gramling*, 601 N.W.2d at 460.

The district court held that the complaint did not sufficiently show that Nagin and Manion had established an attorney-client relationship. The court noted that Nagin's work was solely related to the creation and operation of BDA, and that Nagin never worked on anything for Manion individually. Invoking the well-established rule that a corporate employee does not generally enjoy an attorney-client relationship with corporate counsel, the court dismissed the claims which required proof of that relationship as an element.

Florida and Minnesota have both adopted rules of professional conduct which govern the actions of their states' lawyers. Both states have nearly identical rules about the representation of corporations and similar entities, making clear that the attorney's duty attaches to the entity, not its constituents. Minn. R. Prof. Conduct 1.13(a); R. Regulating Fla. Bar 4-1.13. Cases interpreting these rules have adhered to this proposition. *See Humphrey v. McLaren*, 402 N.W.2d 535, 540 (Minn. 1987) (noting that in representing a corporation against one of its officers or employees, corporate counsel's "allegiance is to the organization"); *Brennan v. Ruffner*, 640 So. 2d 143, 145-46 (Fla. Dist. Ct. App. 1994) (holding that generally an attorney representing a closely held

corporation "owes no separate duty of diligence and care to an individual shareholder absent special circumstances or an agreement to also represent the shareholder individually"). The district court also turned for guidance to a Wisconsin Supreme Court case, *Jesse v. Danforth*, 169 Wis. 2d 229, 485 N.W.2d 63 (Wisc. 1992). Jesse involved a medical malpractice suit against a few named health care professionals. Two of the doctors moved to disqualify the plaintiffs' law firm because the firm had helped those doctors to create a corporation for the purpose of purchasing and operating MRI equipment. The corporation was not a party to the *Jesse* suit. The question presented to the Wisconsin Supreme Court was whether the plaintiffs' law firm must be disqualified where one of its members represented the defendant doctors in their formation of the MRI-related corporation. The court noted that at the initial stages of the firm's relationship with the doctors, it was representing them personally because no corporation had yet been formed. Still, since the representation was limited solely to the creation of the MRI corporation, the court retroactively applied the entity rule to hold that the firm never actually represented the doctors individually:

> [W]here (1) a person retains a lawyer for the purpose of organizing an entity and (2) the lawyer's involvement with that person is directly related to that incorporation and (3) such entity is eventually incorporated, the entity rule applies retroactively such that the lawyer's pre-incorporation involvement with the person is deemed to be representation of the entity, not the person.

Id. at 67.

Relying on *Jesse*, the district court invoked the entity rule to find that Nagin exclusively represented BDA. We agree that if Nagin's only interaction with Manion was to create BDA, Nagin could not be considered Manion's lawyer. Liberally construing the complaint in Manion's favor, though, we cannot agree that Nagin only operated as BDA's attorney. While Nagin may well have represented BDA as its corporate counsel, this does not preclude a finding that Nagin also provided Manion with legal advice and thus established an attorney-client relationship.[5] Manion alleged that he sought and received guidance about how he could maintain control of the corporation. Nagin's advice here was not to BDA, but to Manion personally. Similarly, Manion used Nagin to draft an employment agreement between himself and BDA. Manion expressed his concern that the agreement sufficiently protect his interests, and Nagin accordingly drafted the agreement in a manner that he told Manion would ensure a twenty-year term of employment. When Nagin renegotiated his payment agreement, he and Manion agreed that Nagin would receive a portion of Manion's preferred share dividends. In other words, Nagin was paid for his services, at least in part, out of Manion's pocket.

When Manion asked questions about the incorporation documents and his employment agreement, he was seeking an opinion about the legal interpretation of the documents and whether they benefitted him as contemplated. These matters were not directly related to the formation of BDA-they concerned Manion's personal concerns of how he would be

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[5] The rules professional conduct of both Minnesota and Florida in fact contemplate that corporate counsel may also act as the attorney for an officer or employee of the corporation and generally permit such conduct. Minn. R. Prof. Conduct 1.13(e); R. Regulating Fla. Bar 4-1.13(e).

employed, and whether he would have control of the corporation. *Cf. Jesse*, 485 N.W.2d at 67 ("[W]here the person who retained the lawyer provides information to the lawyer not directly related to the purpose of organizing an entity, then it is the person, not the corporation, which holds the privilege for that communication."). Providing Manion with advice about his personal interest in BDA and the Management Agreement was obviously beyond the scope of Nagin's job as BDA's attorney, and perhaps contrary to it. If Nagin was truly working exclusively as BDA's lawyer, he should have responded to Manion's questions by clarifying that he worked only for BDA and suggested Manion seek outside counsel. *See* Minn. R. Prof. Conduct 1.13(d) (requiring corporate counsel who is dealing with a shareholder or employee to "explain the identity of the client when it appears that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing"); R. Regulating Fla. Bar 4-1.13(d) (same). Instead, Nagin advised Manion that he maintained control over BDA by having a strong financial interest in the preferred stock shares and by holding a twenty-year employment contract. Manion sought and received legal advice on these matters from Nagin, and that is sufficient to establish that an attorney-client relationship existed between the two of them. *Gramling*, 601 N.W.2d at 460; *Beach*, 675 So. 2d at 109.

Nonetheless, Manion has not stated a cognizable claim related to his attorney-client relationship with Nagin. Manion has sufficiently alleged that he established an attorney-client relationship with Nagin relating to Manion's employment contract and control of the corporation. But the arbitrator in Manion's related action against BDA found that Manion operated in bad faith against the corporation's interests by overpaying himself and other BDA shareholders and by failing to disclose financial data which would have revealed

his bad faith. Bound by that finding, the defect in Manion's claims becomes obvious: he asks us to hold that Nagin committed legal malpractice by not warning him that he may lose control of BDA for committing malfeasance toward it, or protecting Manion from termination once Manion operated in that manner. Such a claim is not viable under either Minnesota or Florida law. *Accord* Minn. R. Prof. Conduct 1.2(c) (forbidding an attorney from assisting a client in fraudulent or deceitful conduct); R. Regulating Fla. Bar 4-1.2(d) (same). Accordingly, we affirm the district court's dismissal of Manion's breach of fiduciary duty and negligence claims as they related to Nagin's legal work. *See Tademe v. Saint Cloud State Univ.*, 328 F.3d 982, 990 (8th Cir. 2003) (noting that this court may affirm the district court's grant of summary judgment on any basis supported by the record).

CONCLUSION

We affirm the district court, and deny the appellees' motion to supplement the record.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 03-2869, No. 03-2870

[Filed December 16, 2004]

Patrick T. Manion, Jr.,
Appellant,

v.

Stephen E. Nagin; Herzfeld & Rubin; Herzfeld & Rubin, P.C.; Nagin Gallop Figueredo, P.A.,
Defendants,

Boat Dealers' Alliance, Inc.,
Appellee.

Patrick T. Manion, Jr.; Nancy Manion,
Appellants,

v.

Alex Stirling; Beaver Park Marina, Inc.; William G. Schaeffer; Boats, Inc.; Brian Olson; Donald C.

Mackenzie; Bruce Marine;)
Bruce Crowder; Tom Crowder;)
Marineone Corp.; Tony Lunpkin;)
Cope Auto & Marine, Inc.; Kenneth)
Cope; Counce Marine, Inc.; Tandy)
Counce; Crocker's Marine, Inc.;)
Crocker & Co., L.L.C.; Morehead)
Marine, Inc.; Newland Kay Crocker;)
Terry G. Wilder; Custom Fiberglass)
Manufacturers, Inc.; Frank Franklin;)
"Just Add Water" Boats, Inc.;)
Tim Meyer; Killinger Marine)
Center, Inc.; Douglass Killinger; Norris)
Marine, LTD.; Tom Stidham; Phil Dill)
Boats, Inc.; Phil Dill, Jr.; Port Harbor)
Marine, Inc.; Robert Soucy; Russo's)
Marine Mart, Inc.; Lawrence J.)
Russo, Sr.; Summerville Marine, Inc.;)
Cleveland Wilson; Texas Marine &)
Brokerage, Inc.; Texas Marine of)
Houston, Inc.; Texas Marine of Clear)
Lake, Inc.; Michael Hebert,)
Appellees.)
)

Appeals from the United States District Court
for the District of Minnesota

Before MURPHY, HEANEY, and BEAM, Circuit Judges.

OPINION

HEANEY, Circuit Judge.

In this consolidated appeal, Patrick T. Manion, Jr., challenges the district court's[1] order confirming an arbitration award in favor of the Boat Dealers' Alliance, Inc. (BDA), and Patrick and Nancy Manion contest the district court's order dismissing their claims against individual members of BDA (the Members). We affirm.

BACKGROUND

Patrick Manion worked for many years in the pleasure boat industry. In 1995, he formed BDA, a cooperative of independent retail marine dealers, for the purpose of obtaining better product pricing by leveraging the group's buying power. BDA was incorporated in Florida, and Manion executed a long-term employment agreement which named him as BDA's Executive Director. The agreement required Manion and BDA to arbitrate any dispute that arose between them. Manion's wife, Nancy Manion, also worked for BDA as an at-will employee.

BDA was initially satisfied with Manion's performance, but by 1999, BDA was in dire financial straits. At an emergency shareholders meeting held on February 13, 1999, Manion was terminated. Manion sued BDA, contending that his termination was improper and that BDA had wrongfully converted ninety shares of preferred stock in BDA that Manion owned. Manion sought an injunction requiring BDA

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[1] The Honorable Ann D. Montgomery, United States District Judge for the District of Minnesota.

to continue compensating him under the terms of his employment agreement, and declaratory relief related to the interpretation of that agreement. The district court ordered Manion to arbitrate his claims against BDA, denied his claims for declaratory and injunctive relief, and stayed the remainder of the proceedings. Manion appealed, and this court affirmed the order denying injunctive relief, and dismissed the remainder of his appeal due to a lack of jurisdiction. *See Manion v. Nagin*, 255 F.3d 535 (8th Cir. 2001). Manion also sued the Members, alleging tortious interference with contract; conversion; securities fraud; breach of fiduciary duty; unjust enrichment; tortious interference with prospective business relationships; and conspiracy.[2] Nancy Manion, who was also terminated, sued the individual members for tortious interference with an employment at-will relationship; tortious interference with prospective business relationships; and conspiracy.

Manion and BDA then began the arbitration process, which, according to the arbitrator, "continued over many months with a full range of discovery proceedings and motion practice comparable to complex litigation in United States District Court." (Appellee's App. at 70.) The proceedings included seven days of testimonial hearings, held from May 29 to June 7, 2002, and the admittance of 191 marked exhibits. On June 11, 2002, the arbitrator sent counsel for Manion and BDA a letter confirming their agreement that final submissions would be due at a later date, and that "further proceedings respecting costs, disbursements and

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[2] Patrick Manion also sued Stephen E. Nagin, BDA's general counsel, and his various law firms, asserting a number of claims related to Manion's involvement with BDA. *See Manion v. Nagin*, Nos. 04-1579 & 04-1705. These companion cases are being considered separately by this panel.

attorney fees award will be needed after prevailing party is determined." (*Id.* at 148.)

On November 12, 2002, the arbitrator issued a thirty-one page decision entitled "Findings of Fact, Conclusions of Law and Interim Arbitration Award" (Interim Award). The arbitrator found that Manion's employment contract allowed BDA to terminate him for operating in bad faith against BDA's interest, or for grossly negligent conduct which substantially impaired the continued viability of BDA. He further found Manion to have demonstrated bad faith in at least three instances: 1) by failing to deduct BDA's operating expenses before making dividend payments to BDA's members; 2) by failing to deduct operating expenses before calculating his own compensation; and 3) by withholding financial information that would have alerted BDA to his bad faith.[3] Because of Manion's bad faith conduct, the arbitrator concluded that BDA was legally justified in terminating Manion's employment contract. The arbitrator found that Manion remained the rightful owner of his ninety shares of preferred stock. Since Manion maintained "legal beneficial and unencumbered title to 90 shares of BDA preferred stock," (*id.* at 92), he had no valid claim for conversion of that stock. The arbitrator invited Manion and BDA to submit written position papers concerning the amount and terms of payment for any preferred stock dividends and unpaid salary owed to Manion. The arbitrator further allowed the parties to submit position papers on whether either was the substantially prevailing party and thus entitled to attorneys fees pursuant to Manion's employment contract. The position papers were "due by simultaneous submission to the Arbitrator and [the

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[3] The arbitrator also found that Manion was grossly negligent, but not in a manner which affected the continued viability of BDA.

American Arbitration Association] 30 days subsequent to receipt of this Interim Award." (*Id.* at 94.)

BDA filed its submissions in a timely fashion. Manion did not file a timely submission with the arbitrator, but rather sent a letter to the American Arbitration Association (AAA) raising objections to the Interim Award. On January 7, 2003, a hearing was held during which Manion explained that he never submitted a position paper to the arbitrator because he was forbidden from doing so as a result of a letter from the AAA instructing the parties not to have any further direct communication with the arbitrator. Manion's counsel then engaged the arbitrator in a discussion pertaining to which rules of procedure governed the arbitration proceeding.

Thereafter, Manion sought to vacate the Interim Award, contending that it was invalid because the arbitrator did not use the rules of procedure contemplated by the parties. The district court denied the motion, and on February 21, 2003, the arbitrator issued a document entitled "Final Award." The Final Award incorporated the Interim Award's findings of fact and conclusions of law. As to the remaining outstanding issues, the arbitrator found that Manion was owed $41,181 in past due wages, and $12,670 in dividends. He further found that Manion's damages were offset by monies he overpaid himself for wages and dividends before he was terminated, such that Manion's overpayments exceeded his damages by $28,763. Thus, Manion was entitled to no further payment from BDA, and BDA was entitled to a credit of $28,763 against any future dividend payments to Manion. Lastly, because BDA prevailed on the wrongful termination issue, the arbitrator awarded BDA attorneys fees and costs in the amount of $223,770.50.

BDA moved to confirm the arbitration award in district

court, and Manion moved to vacate it. The Members moved to dismiss the Manions' claims against them for failure to state a claim, or, in the alternative, for summary judgment. The district court heard argument on the motions on May 9, 2003. At the hearing, Manion argued that the arbitration proceedings were not held under the rules contemplated by the parties and thus should be vacated. He did not, however, identify any evidence or argument that he was precluded from presenting to the arbitrator. Finding no error sufficient to justify vacating the arbitration award, the district court confirmed the award. As to the Manions' claims against the Members, the court found that each substantive claim was collaterally estopped due to the arbitrator's conclusions about the propriety of BDA's termination of Manion and Manion's continued ownership of his preferred stock. The court further found that the conspiracy claim failed because it was not based on the commission of any underlying tort. Manion appeals, contending that the district court erred in confirming the arbitration award; the Manions collectively appeal the dismissal of their claims against the Members.

ANALYSIS

We review the district court's findings of fact supporting its confirmation of an arbitration award for clear error and its legal conclusions de novo. *Stark v. Standberg, Phoenix, & von Gontard, P.C.*, 381 F.3d 793, 798 (8th Cir. 2004). Our review of the underlying arbitration award, though, is "very limited." *Gas Aggregation Servs. v. Howard Avista Energy, LLC*, 319 F.3d 1060, 1064 (8th Cir. 2003); *see also Stark*, 381 F.3d at 798 ("When reviewing an arbitral award, courts accord 'an extraordinary level of deference' to the underlying award itself, because federal courts are not authorized to reconsider the merits of an arbitral award 'even though the parties may allege that the award rests on errors of fact or on

misinterpretation of the contract.'" (citations omitted)); *Bhd. of Maint. of Way Employees v. Terminal R.R. Ass'n*, 307 F.3d 737, 739 (8th Cir. 2002) (noting "our scope of review of the arbitration award itself is among the narrowest known to the law"). If the arbitrator is arguably construing or applying the arbitration contract and acting within the scope of his authority, we must uphold the award "[e]ven if the court is convinced that the arbitrator committed serious error." *Gas Aggregation Servs.*, 319 F.3d at 1064.

Under the Federal Arbitration Act (FAA), a court may only vacate an arbitration award:

> (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a). In addition to the grounds enumerated in the FAA, we have recognized two "extremely narrow" extra-statutory bases for vacating an arbitration award where the award is either completely irrational or manifests a disregard for the law. *Hoffman v. Cargill Inc.*, 236 F.3d 458, 461 (8th Cir. 2001); *see also Stark*, 381 F.3d at 798. "An arbitration decision may only be said to be irrational where it fails to draw its essence from the agreement, and an arbitration decision only manifests disregard for the law where the

arbitrators clearly identify the applicable, governing law and then proceed to ignore it." *Hoffman*, 236 F.3d at 461-62.

Having reviewed the voluminous record in this case against the above analytical backdrop, we find no error in the district court's confirmation of the arbitration award. Manion contends that the arbitrator failed to abide by the parties' choice of the AAA's Employment Rules to govern the proceedings, and that he therefore exceeded his powers and rendered a completely irrational decision. Manion's counsel admitted at oral argument before this court, however, that the arbitrator did not prevent him from presenting any of his evidence.[4] Manion suggests that because the arbitrator found against him on his claim of wrongful termination, the arbitrator must have ignored the evidence which compelled a contrary conclusion. Essentially, Manion asks us to reweigh the evidence that was before the arbitrator, which our prior decisions make clear is not our prerogative. *See*, *e.g.*, *Hoffman*, 236 F.3d at 462. The arbitration award reflects a careful consideration of Manion's employment contract, what type of conduct would justify his termination, and whether BDA had proven any instances of that conduct. The arbitrator's conclusion that Manion's termination was justified by at least three instances of malfeasance is amply supported by evidence submitted to the arbitrator, and we will not disturb it on appeal.

Manion further argues that his conversion claim was

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[4] On the contrary, the record shows that the arbitration proceedings were extended and extensive, covering over a week's time for hearings which were documented in nearly two thousand pages of transcript.

denied in manifest disregard of the law and contravened fundamental notions of due process and fair play. He provides no authority for these assertions, and we have found no record evidence to support his contentions. On the contrary, the arbitrator's decision-that Manion's conversion claim fails because he is the still the rightful owner of the stocks claimed to be converted-appears to place him in the same position as if he had prevailed on his conversion claim.

We find equally unavailing Manion's complaint that the bifurcated award procedure employed by the arbitrator should result in vacation of the decision. The arbitrator's Interim Award, issued on November 12, 2002, finally determined the substantive issues of whether Manion was wrongfully terminated and whether his preferred stock had been converted by BDA. Prior to the issuance of that award, the parties had agreed "[f]urther proceedings respecting costs, disbursements and attorney fees award will be needed after prevailing party is determined." (Appellee's App. at 148.) The arbitrator did not decide the amount of past due wages and dividends owed to Manion in his Interim Award, but rather held that decision until the Final Award, granting the parties an opportunity to submit argument on these issues. Manion now claims that because he did not specifically agree that any damages issues would be reserved, the arbitrator acted without authority by not deciding these issues in his Interim Award.

We find no reversible error here. First, we question whether the arbitrator deviated from the procedures agreed to by the parties. The record indicates that the parties agreed the arbitrator would reserve ruling on certain issues ancillary to substantive liability findings, and that is precisely what happened. Moreover, it is difficult to discern any prejudice to Manion from the bifurcated award procedure. In the Interim

Award, the arbitrator rejected the substance of both Manion's wrongful termination and conversion claims. The only unresolved issues were the amounts BDA owed for past wages and dividends, and whether either party was entitled to costs and attorneys fees as the prevailing party. Each party was given the opportunity to argue its position on those matters, and each did. Indeed, the arbitrator granted Manion a time extension so that he could file his submission, casting doubt on any argument that the three and a half month delay between the Interim Award and Final Award somehow unduly burdened him. Manion would have us review the details of his arbitration proceedings employing a level of scrutiny conferred by neither the FAA nor the Constitution. We decline the invitation, and thus affirm the district court's confirmation of the arbitration award.

We next consider whether the district court properly dismissed the Manions' claims against the Members. The district court held that the claims were precluded by application of the collateral estoppel doctrine.[5] "A district court's rulings on issues of law, including the application of collateral estoppel, are reviewed de novo." *Banks v. Int'l Union Elec., Elec., Technical, Salaried, & Mech. Workers*, 390 F.3d 1049, 2004 U.S. App. LEXIS 24909, 2004 WL 2754689, at *4 (8th Cir. Dec. 3, 2004).

> Collateral estoppel is appropriate when: (1) the issue sought to be precluded is identical to the issue previously decided; (2) the prior action resulted in a final adjudication on the merits; (3) the party sought

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[5] The district court held that the Manions' conspiracy claims failed because they were not based on any viable underlying tort, rather than due to collateral estoppel.

> to be estopped was either a party or in privity with a party to the prior action; and (4) the party sought to be estopped was given a full and fair opportunity to be heard on the issue in the prior action.

Wellons, Inc. v. T.E. Ibberson Co., 869 F.2d 1166, 1168 (8th Cir. 1989); *see also Mandich v. Watters*, 970 F.2d 462, 465 (8th Cir. 1992) (applying Minnesota law). A final arbitration award has the same preclusive effect as a prior judgment. *U.S. West Fin. Servs., Inc. v. Buhler, Inc.*, 150 F.3d 929, 932 (8th Cir. 1998).

We agree with the district court that each of the Manions' claims, save the conspiracy allegations, are collaterally estopped.[6] Tortious interference with contract requires proof, inter alia, that a contract was breached, *Kallok v. Medtronic, Inc.*, 573 N.W.2d 356, 362 (Minn. 1998), and the arbitrator found that BDA did not breach its employment contract with Manion. Manion based his conversion and securities fraud claims on the allegation that BDA now has his preferred stock, but the arbitrator explicitly found that Manion still holds title to and owns the stock. Manion's claim for breach of fiduciary duty is premised on alleged surreptitious conduct of the Members that resulted in Manion's wrongful termination and conversion of his stock; his unjust enrichment theory, also relates to his employment and stock ownership. As to the Manions' claim for tortious interference with prospective business relationships, we cannot ascertain from the complaint what prospective business relationships are

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[6] Manion contends that the district court erred by applying collateral estoppel because the arbitration proceedings were "fundamentally unfair." (Appellant's Br. at 57.) As discussed at length above, we disagree.

alleged to have been disturbed. Construing the complaint liberally, *Maki v. Allete, Inc.*, 383 F.3d 740, 742 (8th Cir. 2004), we assume that the Manions claim the Members wrongfully interfered with their relationships with BDA. Again, though, the arbitrator found that it was Manion's conduct that was wrongful, and he may not revisit that finding here.[7] With no underlying tort supporting the Manions' conspiracy claim, it fails as well. We thus affirm the dismissal of the Manions' suit against the Members.

CONCLUSION

For the reasons stated herein, we affirm the district court's confirmation of the arbitration award and dismissal of the Manions' claims against the Members.

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[7] The Manions' brief contains no independent argument for reversal of Nancy Manion's claim for tortious interference with an at-will employment relationship.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Civil No. 00-238 ADM/RLE,
Civil No. 02-370 ADM/RLE

[Filed February 5, 2004]

Patrick T. Manion, Jr.,
Plaintiff,

v.

Stephen E. Nagin, Herzfeld & Rubin, Herzfeld & Rubin, P.C., Nagin Gallop Figueredo, P.A., and Boat Dealers' Alliance, Inc.,
Defendants.

Patrick T. Manion, Jr. and Nancy Manion,
Plaintiffs,

v.

Alex Stirling et al.,
Defendants.

ANN D. MONTGOMERY
UNITED STATES DISTRICT JUDGE

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

The Renewed Motion to Dismiss ['238 Docket No. 148] of Defendants Stephen E. Nagin ("Nagin"), Herzfeld & Rubin, Herzfeld & Rubin, P.C., and Nagin Gallop Figueredo, P.A. (collectively, "the '238 Defendants") was argued before the undersigned United States District Judge on December 11, 2003.[1] The Court also heard the '238 Defendants' Motion to Dismiss Boat Dealers' Alliance, Inc.'s ("BDA") Cross-Claim ['238 Docket No. 139], BDA's Motion for an Award of Attorneys' Fees ['238 Docket No. 113], and Motion for Sanctions ['238 Docket No. 116]. Additionally, certain Defendants from the '370 action ("the '370 Defendants") moved for attorneys' fees [Docket Nos. 110, 113] and for sanctions [Docket Nos. 104, 108]. For the reasons explained below, the '238 Defendants' Renewed Motion to Dismiss is granted, the '238 Defendants' Motion to Dismiss BDA's Cross-Claim is granted, BDA's Motion for Attorneys' Fees is granted in part and denied in part, the '370 Defendants' Motion for Attorneys' Fees is denied, and BDA's and the '370 Defendants' Motions for Sanctions are denied.

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[1] The '238 Defendants' Renewed Motion to Dismiss supplements Defendants Nagin's and Nagin Gallop Figueredo, P.A.'s initial Motion to Dismiss or to Stay Proceedings [Docket No. 21], which was joined by Defendants Herzfeld & Rubin and Herzfeld & Rubin, P.C. [Docket No. 47]. In addition to the arguments set forth in their Renewed Motion to Dismiss, Defendants also reiterate arguments made in their first dismissal motion.

II. BACKGROUND

In the spring of 1995, Plaintiff Patrick T. Manion, Jr. ("Manion" or "Plaintiff") hired Nagin, an attorney, to organize and incorporate BDA. *See* '238 Compl. ¶¶ 3, 22-23. Nagin filed BDA's articles of incorporation, wrote its by-laws, prepared a management agreement concerning Manion's position as BDA's executive director ("Management Agreement"), and drafted BDA's contract with the Outboard Marine Corporation ("OMC Contract"). *See id.* ¶¶ 35, 39, 47-49, 66-72. Nagin also wrote a stock redemption agreement concerning Manion's shares of preferred stock in BDA. *Id.* ¶ 85.

This litigation results from BDA's termination of Manion as its executive director at an emergency shareholders meeting held in February 1999. *Id.* ¶ 89. Manion filed suit against the '238 Defendants on February 1, 2000, alleging that his termination was improper and asserting claims for breach of fiduciary duty, negligence, and interference with contract.[2] *See id.* ¶¶ 116-127. Manion sued BDA for breach of contract, and subsequently filed a second lawsuit against individual members of BDA. *Id.* ¶¶ 112-115; *see* '370 Compl. ['370 Docket No. 1]; '370 Am. Compl. ['370 Docket No. 41]. In the '238 litigation, BDA filed a Cross-Claim against the '238 Defendants ['238 Docket Nos. 88, 111], alleging professional malpractice in Nagin's legal representation of BDA.

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[2] In their Renewed Motion to Dismiss, the '238 Defendants state that Manion also asserts a breach of contract claim against them. However, Manion's Complaint alleges this claim against BDA only. Therefore, the Court does not address the '238 Defendants' breach of contract arguments in this Order.

This Court granted BDA's motion to compel arbitration in its August 2, 2000 Order ['238 Docket No. 68]. The arbitration hearing was held in Minneapolis, Minnesota, from May 29 to June 7, 2002, and Arbitrator Richard Pemberton ("Arbitratror") issued his Findings of Fact, Conclusions of Law and Interim Arbitration Award ("Interim Award") on November 12, 2002. See Wackman Aff. Ex. 2.[3] The Arbitrator determined that "Manion engaged in bad faith and in grossly negligent conduct" by (1) failing to deduct operating expenses when making dividend payments to BDA's members, (2) failing to deduct operating expenses in calculating his own compensation, and (3) withholding financial information in his possession that would have revealed his bad faith. Interim Award at 8-12. Based on these findings of fact in his Interim Award, the Arbitrator concluded "adequate justification for BDA's [terminating Manion] exists," and Manion's breach of contract claim was denied. *Id.* at 12, 21. The Arbitrator also held that Manion owned 90 shares of preferred stock in BDA, and found that such stock had never been converted to BDA ownership. *Id.* at 12, 21-22. On February 21, 2003, the Arbitrator issued his Final Award, fully incorporating these findings of fact from the Interim Award (collectively, the "Awards"). *See* Wackman Aff. Ex. 6. The Arbitrator found that BDA was the prevailing party on the "most significant issue of the arbitration." Final Award at 6-7.

Based on the Awards and findings from the arbitration, the Court dismissed all claims asserted against BDA. *See* Order of 6/20/03 ['238 Docket No. 108]; Supplemental Order

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[3] As there are multiple "Wackman Affidavits" of record, all citations herein to a Wackman Affidavit, unless indicated otherwise, refer to the affidavit filed April 29, 2003 ['238 Docket No. 103].

of 7/21/03 ['238 Docket No. 123]. The '370 case was dismissed in an Order dated June 20, 2003. ['370 Docket No. 100]. Consequently, only the direct claims and cross-claims against the '238 Defendants remain.

III. DISCUSSION

The '238 Defendants move to dismiss both Manion's Complaint and BDA's Cross-Claims.

A. The '238 Defendants' Renewed Motion to Dismiss

The '238 Defendants argue that Manion's Complaint should be dismissed based on the combined grounds of failure to state cognizable claims and collateral estoppel. Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that a party may move to dismiss claims for failure to state a claim upon which relief can be granted. In considering a motion to dismiss, courts must construe the pleadings in the light most favorable to the nonmoving party and view the facts alleged in the complaint as true. *Hamm v. Groose*, 15 F.3d 110, 112 (8th Cir. 1994); *Ossman v. Diana Corp.*, 825 F. Supp. 870, 879-80 (D. Minn. 1993). Courts should resolve any ambiguities concerning the sufficiency of the claims in favor of the nonmoving party, and dismiss claims "only if it is clear that no relief can be granted under any set of facts that could be proved consistent with the allegations." *Frey v. City of Herculaneum*, 44 F.3d 667, 671 (8th Cir. 1995) (citations omitted); *see Hafley v. Lohman*, 90 F.3d 264, 266 (8th Cir. 1996); *Ossman*, 825 F. Supp. at 880.

The '238 Defendants assert that Manion's claims for negligence and breach of fiduciary duty must be dismissed under Rule 12(b)(6). First, they argue that Manion has not stated claims for malpractice and breach of fiduciary duty

because he has failed the threshold showing that Nagin owed him a duty as his personal attorney. To pursue a legal malpractice claim under Minnesota law,[4] the plaintiff must first prove that the defendant owed him a duty of care. *See Togstad v. Vesely Otto Miller & Keefe*, 291 N.W.2d 686, 692 (Minn. 1980). In Florida, attorneys' liability for professional negligence is limited to "clients with whom they share privity of contract," meaning that no duty of care arises here unless Nagin was employed as Manion's counsel. *See Angel Cohen & Rogovin v. Oberon Inv., N.V.*, 512 So.2d 192, 194 (Fla. 1987); *Brennan v. Ruffner*, 640 So.2d 143, 145 (Fla. Dist. Ct. App. 1994). To support a claim for breach of fiduciary duty, the plaintiff must establish that the defendant was obligated to him as a fiduciary. *See Gracey v. Eaker*, 837 So.2d 348, 353 (Fla. 2002) (holding that the existence of a fiduciary duty is the first element in a breach of fiduciary duty claim); *Padco, Inc. v. Kinney & Lange*, 444 N.W.2d 889, 891 (Minn. Ct. App. 1989) (explaining that under Minnesota law elements in a claim for breach of fiduciary duty are the same as those in a negligence action).

Both a duty of care and a fiduciary duty arise from the creation of an attorney-client relationship, which in Minnesota may be formed under either a tort or contract theory. *Gramling v. Mem'l Blood Ctrs.*, 601 N.W.2d 457, 459 (Minn. Ct. App. 1999). The contract theory holds that parties create an attorney-client relationship if they either explicitly or implicitly form a contract for legal services. *Id.* Under a

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[4] The '238 parties dispute whether Minnesota or Florida law governs the merits of this litigation. Since both states have similar requirements of an attorney-client relationship prior to imposing a duty of care, the Court applies the law from both states in analyzing the '238 Defendants' Renewed Motion to Dismiss. Here, the choice of law decision has no effect on the outcome.

tort theory of representation, an attorney-client relationship exists "whenever an individual seeks and receives legal advice from an attorney in circumstances in which a reasonable person would rely on such advice." *Togstad*, 291 N.W.2d at 693 n.3. An attorney-client relationship is created under Florida law when a client believes that "he is consulting a lawyer in that capacity and his manifested intention is to seek professional legal advice." *Fla. Bar v. Beach*, 675 So.2d 106, 109 (Fla. 1996). However, the client's subjective beliefs about representation must be reasonable. *Id.* Whether an attorney-client relationship exists is a factual determination based on the circumstances of each case. *Palafrugell Holdings, Inc. v. Cassel*, 825 So. 2d 937, 939-40 (Fla. Dist. Ct. App. 2001); *Admiral Merchants Motor Freight, Inc. v. O'Connor & Hannan*, 494 N.W.2d 261, 265 (Minn. 1992).

The attorney's representation of an organizational client such as BDA adds another layer to this inquiry. Because the organization itself is the client, attorneys hired to represent organizations owe a duty only to the entity and not to the organization's constituents.[5] *See* Fla. Rules of Prof'l Conduct R. 4-1.13; Minn. Rules of Prof'l Conduct R. 1.13. Case law from both Minnesota and Florida acknowledges the existence of this "entity rule" and stresses that "the attorney's allegiance is to the organization." *See Humphrey v. McLaren*, 402 N.W.2d 535, 540 (Minn. 1987); *see also Brennan*, 640 So.2d at 146. Consequently, the attorney should always act in the best interests of the entity even if such actions are potentially adverse to individual constituents. *See* Cmts. to

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[5] "Constituents" are the officers, directors, employees, and shareholders of the corporate organizational client. Cmts. to Fla. Rules of Prof'l Conduct R. 4-1.13; Cmts. to Minn. Rules of Prof'l Conduct R. 1.13.

Fla. Rules of Prof'l Conduct R. 4-1.13; Cmts. to Minn. Rules of Prof'l Conduct R. 1.13.

The entity rule applies retroactively when individuals hire attorneys to form corporations. While the Minnesota and Florida rules concerning organizational clients do not specifically discuss lawyers' duty to individuals who retain them to incorporate businesses, state rules of professional responsibility are generally designed to "enhance the corporate lawyer's ability to represent the best interests of the corporation without automatically having the additional and potentially conflicting burden of representing the corporation's constituents." *Jesse v. Danforth*, 169 Wis. 2d 229, 485 N.W.2d 63, 67 (Wis. 1992); Fla. Rules of Prof'l Conduct R. 4-1.13; Minn. Rules of Prof'l Conduct R. 1.13.[6] In situations where an individual hires an attorney to organize an entity, the entity rule's purpose would be defeated if the attorney were *a priori* deemed to represent both the individual and the organization. Therefore, the entity rule applies retroactively where a person "(1) retains a lawyer for the purpose of organizing an entity and (2) the lawyer's involvement with that person is directly related to that incorporation and (3) such entity is eventually incorporated. . . ." *Jesse*, 485 N.W.2d at 67. In these circumstances, "the lawyer's pre-incorporation involvement with the person is deemed to be representation of the entity, not the person." *Id.*

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[6] The Wisconsin Supreme Court Rule regarding a lawyer's duty to an organizational client is identical to the Minnesota and Florida rules for entity representation. *See* Wis. SCR 20:1.13; *see also* Fla. Rules of Prof'l Conduct R. 4-1.13; Minn. Rules of Prof'l Conduct R. 1.13.

The allegations plead in the '238 Complaint do not support the position that Nagin represented Manion personally and owed him a duty of care and a fiduciary duty, but show instead that Nagin represented BDA only. Manion admits that Nagin was BDA's attorney, but claims that Nagin acted as his personal counsel as well. *See* '238 Compl. ¶ 26. However, the facts in the Complaint, even taken as true, reveal that Nagin's legal work involving Manion was solely for the benefit of BDA. Manion does not claim that Nagin performed non-BDA related work for him. Rather, Manion's stated purpose in hiring Nagin was to organize and incorporate BDA. See id. ¶¶ 3, 23, 25. Manion asserts that Nagin filed BDA's articles of incorporation, wrote its by-laws, prepared the Management Agreement for Manion regarding Manion's position as BDA's executive director, and drafted BDA's contract with the Outboard Marine Corporation. *See id.* ¶¶ 35, 39, 47-49, 66-72. Nagin also drafted a stock redemption agreement concerning Manion's shares of preferred stock in BDA. *Id.* ¶ 85.

While Nagin clearly owed a duty to BDA in performing these tasks as BDA's attorney, under the entity rule he did not automatically owe a separate duty to Manion. This is true even though Manion hired him to incorporate BDA, paid him for these services, and retained Nagin's services after Nagin switched law firms. *See Jesse*, 485 N.W.2d at 67. Individuals cannot circumvent the entity rule's purposes by simply claiming that legal work related to corporate activities was undertaken for their benefit as constituents and not for the corporate entity. *Id.*; *see also Brennan*, 640 So.2d at 146; *Humphrey*, 402 N.W.2d at 540. Manion claims that he hired Nagin to represent him individually in "organizing, owning, and operating" BDA, but fails to explain how this legal work was completed for him personally. This failure eviscerates Manion's claim that he had an attorney-client relationship

with Nagin, for even if Manion honestly believed that Nagin was acting as his attorney and not for BDA, his belief must be reasonable. *Fla. Bar*, 675 So.2d at 109; *Togstad*, 291 N.W.2d at 693 n.3. Consequently, Manion has not shown that Nagin owed him personally either a duty of care or a fiduciary duty. Therefore, the claims for breach of fiduciary duty and negligence against the '238 Defendants must be dismissed with prejudice.

The '238 Defendants also argue that collateral estoppel bars some of Manion's negligence claims and Manion's claim for tortious interference with contract. Collateral estoppel, or issue preclusion, is appropriate when: "(1) the issue sought to be precluded is identical to the issue previously decided; (2) the prior action resulted in a final adjudication on the merits; (3) the party sought to be estopped was either a party or in privity with a party to the prior action; and (4) the party sought to be estopped was given a full and fair opportunity to be heard on the issue in the prior action." *Wellons, Inc. v. T.E. Ibberson, Co.*, 869 F.2d 1166, 1168 (8th Cir. 1989).

Application of this standard to the Arbitrator's findings precludes Manion from now contesting the basis of his termination or ownership of the preferred shares. First, some of Manion's negligence claims and his interference with contract claim against Nagin rely on Manion's assertion that his termination was unfounded and that BDA improperly converted his shares of preferred stock. These issues were adjudicated during the arbitration and the Arbitrator found that Manion's bad faith conduct justified his termination and that he owned the stock. Interim Award at 12, 21-22, Wackman Aff. Ex. 2. Second, an arbitration award is a final adjudication on the merits. *See Wellons*, 869 F.2d at 1168. Third, Manion was a party in the arbitration proceedings and was given a full opportunity to express his views about his

termination and ownership of the preferred shares. Therefore, Manion is estopped from asserting that there was no basis for his termination or that he lost control of his BDA stock.

Applying collateral estoppel to Manion's specific allegations, the Court must dismiss any negligence or tortious interference claims that rely on facts contrary to the Arbitrator's findings. The basic elements in a legal malpractice claim under Minnesota and Florida law include: (1) the existence of an attorney-client relationship or duty; (2) negligent conduct by the attorney, and; (3) damage to the client resulting from such conduct. *See Togstad*, 291 N.W.2d 686 at 692; *see also Kates v. Robinson*, 786 So.2d 61, 64 (Fla. Dist. Ct. App. 2001). The elements in a tortious interference claim are: (1) the existence of a contract; (2) the alleged wrongdoer's knowledge of the contract; (3) intentional procurement of its breach; (4) without justification; and (5) damages. *See Furlev Sales & Assocs., Inc. v. N. Am. Auto., Inc.*, 325 N.W.2d 20, 25 (Minn. 1982); *see also McDonald v. McGowan*, 402 So.2d 1197, 1201 (Fla. Dist. Ct. App. 1981). To support his claims, Manion asserts that Nagin negligently limited his ability to control BDA, acted inappropriately regarding Manion's stock and dividends, and improperly interfered with his rights under the Management Agreement. *See* '238 Compl. ¶¶ 27-34, 42- 44, 63-65, 89-100, 103-06, 120-27. However, because the Arbitrator determined that Manion retained his preferred shares and was not damaged, Manion may not assert malpractice claims based on Nagin's alleged negligence regarding the stock certificates. Concerning his tortious interference claim, Manion may not litigate his claim that Nagin lacked justification for procuring a breach of the Management Agreement, even assuming Nagin convinced BDA to fire Manion, because Manion was found to have acted in bad faith while employed at BDA. Nagin's position as BDA's attorney

required him to protect BDA's interests, and BDA possessed legitimate reasons for terminating Manion. Consequently, the justification element of his tortious interference claim is negated by the Arbitrator's finding. Therefore, Manion's negligence claims related to his loss of stock and his claim for interference with contract are dismissed with prejudice.[7]

The '238 Defendants' final argument supporting dismissal is premised upon Plaintiff's failure to comply with Minnesota's expert affidavit requirement. A claim for legal malpractice in Minnesota may not proceed unless the plaintiff files an affidavit from an expert identifying the reasons the defendant attorney's conduct was negligent. *See* Minn. Stat. § 544.42. The penalty for noncompliance is mandatory dismissal unless the plaintiff attempted to follow the statute but somehow filed a deficient affidavit. *Id.* Because Manion filed no expert affidavit under § 544.42 Subdivision 4, the '238 Defendants assert that his claim is frivolous and must be dismissed. *See House v. Kelbel*, 105 F. Supp. 2d 1045, 1050-54 (D. Minn. 2000) (holding that the court must dismiss malpractice claims as frivolous when the plaintiff does not file expert affidavit as required by § 544.42); *see also Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 191 (Minn. 1990) (holding as frivolous per se a medical malpractice action where the plaintiff did not comply with Minn. Stat. § 145.682, a provision with requirements almost identical to those in § 544.42).

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[7] The '238 Defendants also argue that collateral estoppel precludes any malpractice claims based on Nagin's allegedly negligent drafting of the Management Agreement. However, because it is arguable that the negligence resulted from Nagin's failure to draft an agreement that prohibited his termination under any circumstances, collateral estoppel does not bar all of Plaintiff's malpractice claims.

Plaintiff counters that compliance with the Minnesota expert affidavit requirement is unnecessary for two reasons. First, assuming that the requirement is procedural, *Erie* and its progeny bar the statute's application to Plaintiff's case because federal courts sitting in diversity apply state substantive law and federal procedural law. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938); *see also Hanna v. Plumer*, 380 U.S. 460, 465-66, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965). Second, Plaintiff asserts that the requirement is not applicable even if the Minnesota statute is substantive under *Erie* because, in Plaintiff's view, Florida law governs the merits of this case.

While the applicability of Minnesota Statute § 544.42 need not be reached in light of the dismissal on other grounds, Plaintiff's argument will be addressed. Section 544.42 is arguably substantive under *Erie* because it does not directly conflict with a Federal Rule of Civil Procedure and its application would significantly affect the outcome of this litigation. *See Hanna*, 380 U.S. at 471; *see also Guaranty Trust Co. v. York*, 326 U.S. 99, 109, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945). Further, other judges in this district have applied Minnesota state law expert affidavit requirements to diversity cases and held that such provisions are substantive. *See Ellingson v. Walgreen Co.*, 78 F. Supp. 2d 965, 968-69 (D. Minn. 1999) (Rosenbaum, J.); *Oslund v. United States*, 701 F. Supp. 710, 714 (D. Minn. 1988) (Murphy, J.). Though Plaintiff contends that dicta from the August 2, 2000 Order determined that Florida law controls the case, the Court has not directly ruled on choice of law issues concerning this litigation. Therefore, Plaintiff's failure to comply with § 544.42 presents an additional basis for dismissal.

In summary, Plaintiff's claims against the '238 Defendants for breach of fiduciary duty, negligence, and interference with

contract are dismissed with prejudice because Plaintiff has not shown that he had an attorney-client relationship with Nagin, that he suffered damages concerning his shares of preferred stock, and that Nagin lacked justification for counseling BDA to terminate Plaintiff's employment.

B. The '238 Defendants' Motion to Dismiss BDA's Cross-Claims

The '238 Defendants also move to dismiss BDA's Cross-Claims. Among the many arguments the '238 Defendants offer supporting their Motion is the assumption that the Court should decline to exercise supplemental jurisdiction over BDA's Cross-Claims. In civil actions where federal district courts have original jurisdiction, they may also exercise supplemental jurisdiction over claims that form part of the same case or controversy as the original claims. 28 U.S.C. § 1367(a). However, courts may decline to exercise supplemental jurisdiction under the following circumstances: (1) the claim raises novel or complex issues of state law; (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction; (3) the district court has dismissed all claims over which it has original jurisdiction; or (4) in exceptional circumstances, there are other reasons for declining jurisdiction. *See id.* § 1367(c).

The Court declines to exercise supplemental jurisdiction over BDA's Cross-Claims based on the third exception delineated in § 1367(c). Because this Order dismisses Plaintiff's claims against the '238 Defendants, all claims over which the Court had original jurisdiction have been dismissed. State court is a more appropriate forum for BDA's Cross-Claims, as BDA and the '238 Defendants lack diversity and BDA only asserts state law claims. *See* BDA's Am. Cross-Cl.

¶¶ 17-38. Further, dismissal of BDA's federal action does not deprive it of a legal remedy because BDA has filed related claims against Nagin and Nagin Gallop Fegueredo, P.A. in Minnesota state court, and state District Judge Leung denied the Defendants' motion to dismiss. *See Boat Dealers' Alliance, Inc. v. Stephen E. Nagin & Nagin, Gallop, Figueredo, P.A.*, No. CT 03-8329 (Minn. Dist. Ct., Dist. 4, Jan. 15, 2004). Therefore, BDA's Cross-Claim is dismissed with prejudice.

C. BDA's and Certain '370 Defendants' Motions for Attorneys' Fees Against Manion[8]

BDA and certain '370 Defendants seek attorneys' fees from Manion under the terms of his Management Agreement with BDA. BDA seeks attorneys' fees incurred both before and after the arbitration proceedings in the '238 litigation, but has not requested fees related to work completed during the arbitration itself. The '370 Defendants request fees generated in defending Manion's suit against them.

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[8] The '370 Defendants who move for attorneys' fees include: William G. Schaeffer, Boats, Inc., Brian Olson, Donald C. Mackenzie, MarineOne Corp., Tony Lumpkin, Custom Fiberglass Manufacturers, Inc., Frank Franklin, Killinger Marine Center, Inc., Douglass Killinger, Phil Dill Boats, Inc., Phil Dill, Jr., Port Harbor Marine, Inc., Robert Soucy, Russo's Marine Mart, Inc., Lawrence J. Russo, Sr., Summerville Marine, Inc., Cleveland Wilson, Texas Marine & Brokerage, Inc., Texas Marine of Houston, Inc., Texas Marine of Clear Lake, Inc., Michael Hebert, Alex Stirling, Bruce Marine, Inc., Bruce Crowder, Tom Crowder, Cope Auto & Marine, Inc., Kenneth Cope, Counce Marine, Inc., Tandy Counce, "Just Add Water" Boats, Inc., Tim Meyer, Norris Marine Ltd., and Tom Stidham.

Litigants may recover attorneys' fees "if specifically authorized by contract or statute." *Van Vickle v. C.W. Scheurer & Sons, Inc.*, 556 N.W.2d 238, 242 (Minn. Ct. App. 1996); *see also Chicago Title Ins. Co. v. F.D.I.C.*, 172 F.3d 601, 604-05 (8th Cir. 1999); *N. Lakeland Pain & Trauma, Inc. v. Benson*, 813 So.2d 1075, 1076 (Fla. Dist. Ct. App. 2002) (holding that a prevailing party is not generally entitled to attorneys' fees absent a statutory or contractual basis). Paragraph 9D of the BDA Management Agreement entitles the prevailing party to payment of attorneys' fees and costs in any litigation resulting from the agreement. It states as follows:

> If any dispute arising out of this Agreement results in arbitration, litigation, or appeal, the substantially prevailing party shall be entitled to repayment of reasonable attorneys' fees and costs associated with such legal action.

See Wackman Aff. of 7/3/03 Ex. A. [Docket No. 115].

BDA and the '370 Defendants claim that they are "substantially prevailing parties" as stated in Paragraph 9D. Under Florida law, which controls the interpretation of the Management Agreement, a "prevailing party" for attorneys' fees purposes is the party who wins the significant issues involved in the litigation.[9] *See Moritz v. Hoyt Enterprises, Inc.*, 604 So. 2d 807, 810 (Fla. 1992). Only one party prevails in a breach of contract claim absent compelling or unusual circumstances. *See Hutchinson v. Hutchinson*, 687

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[9] Paragraph 9B of the Management Agreement states "This Agreement shall be construed and interpreted in accordance with the laws of the State of Florida." *Id.* at 8.

So.2d 912, 913 (Fla. Dist. Ct. App. 1997); *Green Cos., Inc. v. Kendall Racquetball Inv., Ltd.*, 658 So.2d 1119, 1121 (Fla. Dist. Ct. App. 1995). Because the Arbitrator determined that Manion's bad faith and grossly negligent conduct provided BDA with justification to terminate Manion, denied Manion's breach of contract claim, and concluded that BDA was the "substantially prevailing party" in the arbitration, BDA qualifies as a prevailing party. BDA has also successfully defended the Arbitration Award in federal court, strengthening its designation as a prevailing party. Based on these results from the arbitration and litigation, BDA has proven that it is a "substantially prevailing party" under Paragraph 9D.

While BDA is entitled to attorneys' fees, establishing whether BDA may recover both pre- and post-arbitration fees requires additional analysis. BDA moves to recover $46,807.80 in fees that the law firms of Gadsby & Hannah, L.L.P. ("Gadsby") and Cousineau, McGuire & Anderson ("Cousineau") generated for work completed before the arbitration.[10] Assuming that BDA moved for all pre-arbitration fees during arbitration, collateral estoppel precludes BDA from recovery. As discussed above, collateral estoppel prohibits parties from re-litigating issues which have already been adjudicated on the merits in prior proceedings, and an arbitration award constitutes a final adjudication on the merits. *Wellons*, 869 F.2d at 1168. BDA currently moves for fees unrelated to the arbitration, but appears to have previously sought payment of these same fees during arbitration. In BDA's post-arbitration brief regarding attorneys' fees, BDA asked the Arbitrator to award all

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[10] BDA requests $13,681 in fees for Gadsby & Hannah, L.L.P. and $33,126.80 in fees for Cousineau, McGuire & Anderson.

attorneys' fees and costs incurred through March 11, 2002. *See* Mem. in Opp'n to BDA's Mot. for Attys' Fees Ex. 1 (emphasis added). This statement suggests that BDA requested pre-arbitration fees related to the arbitration and fees generated from non-arbitration work. Because the Arbitrator declined to award any fees attributable to Gadsby or Cousineau in the Final Award, BDA may not now seek recovery of these same fees.

Even if collateral estoppel does not bar BDA's current motion, 9D limits recovery to reasonable attorneys' fees. The value of fees generated from work completed two to four years ago by Gadsby and Cousineau, firms no longer participating in this litigation, is "highly speculative and conjectural" for the reasons cited in the Final Award. Wackman Aff. Ex. 9. Therefore, BDA's Motion for an Award of Attorneys' Fees is denied to the extent it seeks pre-arbitration fees.

BDA may however, recover post-arbitration fees related to this litigation. BDA has incurred legal fees in defending Manion's two motions to vacate the arbitration award and in moving to confirm the award. Because this work directly relates to the dispute with Manion over the Management Agreement and the arbitration award has been confirmed, BDA is the "substantially prevailing party" and Paragraph 9D applies. *See* Order of June 20, 2003. BDA has not yet recovered these fees, and could not have moved for payment before issuance of the Final Award since the fees had not yet been generated. Thus collateral estoppel does not bar recovery of the post-arbitration attorneys' fees. Finally, the amount of BDA's request is reasonable and fair given the legal work provided by the Rider Bennett law firm, BDA's

current counsel. Therefore, BDA's request for post-arbitration attorneys' fees totaling $ 45,041.50 is granted.[11]

Whether the '370 Defendants are entitled to attorneys' fees as a prevailing party under 9D presents a closer question. The '370 Defendants are not signatories of the Management Agreement, but argue that they are third party beneficiaries and that 9D consequently applies to them. The '370 Defendants state further that they are a prevailing party because the '370 lawsuit, which arose from the parties' dispute about the Management Agreement, was dismissed on their motion. Manion counters that the '370 Defendants have not shown that they are third-party beneficiaries of the Management Agreement and therefore cannot recover attorneys' fees.

Traditional principles of contract interpretation and construction determine one's status as a third-party beneficiary. *See United Steel Workers of Am., AFL-CIO-CLC v. Rawson*, 495 U.S. 362, 375, 109 L. Ed. 2d 362, 110 S. Ct. 1904 (1990); *Pure Country, Inc. v. Sigma Chi Fraternity*, 312 F.3d 952, 958 (8th Cir. 2002). Whether the parties intend the contract to benefit a third party is a question of fact. *Gold'n Plump Poultry, Inc. v. Simmons Eng'g Co.*, 805 F.2d 1312, 1318 (8th Cir. 1986); *Decarlo v. Griffin*, 827 So.2d 348, 352 (Fla. Dist. Ct. App. 2002). Under Florida law, one is a third-party beneficiary only if the parties to the contract "clearly express, or the contract itself expresses, an intent to primarily and directly benefit the third party or a class of

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[11] BDA's request for fees incurred from June 30, 2003 through this Motion's hearing date of December 11, 2003 is not addressed because BDA did not submit affidavits itemizing fees for this period.

persons to which that party claims to belong." *Caretta Trucking, Inc. v. Cheoy Lee Shipyards, Ltd.*, 647 So.2d 1028, 1031 (Fla. Dist. Ct. App. 1994). It must be shown that both contracting parties intended to benefit the third party in order to prove the requisite intent. *Id.*

The '370 Defendants cannot benefit from the attorneys' fees provision in Paragraph 9D because they have not proven that they are third-party beneficiaries of the Management Agreement. The record lacks any evidence suggesting that BDA, let alone Manion, intended that BDA members would benefit from the Management Agreement's terms. The Management Agreement lists BDA and Manion as the contracting parties and details Manion's duties as BDA's executive director, but does not name a third-party beneficiary. *See* Wackman Aff. of 7/3/03 Ex. A. Further, the '370 Defendants do not cite other evidence beyond the Management Agreement to support their claim. Consequently, the '370 Defendants Motion for Attorneys' Fees is denied.

D. BDA's and Certain '370 Defendants' Motions for Sanctions[12]

Finally, BDA and certain '370 Defendants move for sanctions against Manion and his counsel, alleging Manion acted in bad faith during this litigation. BDA and the '370 Defendants request Rule 11 sanctions against either Manion or his attorney William J. French ("French") and the law firm of Conant, French & Chaney ("Conant"), and seek additional sanctions under 28 U.S.C. § 1927 against French and Conant for their "unreasonable and vexatious multiplication of the proceedings in this case." *See* BDA's Mem. in Support at 1.

Both Rule 11 and § 1927 allow courts to sanction attorneys for improper conduct. Rule 11 authorizes sanctions against attorneys who file pleadings and motions that have no legal or factual basis, or who take actions intended to harass, delay, or unnecessarily add cost to the litigation. Fed. R. Civ. P. 11. Section 1927 provides that an attorney who "multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees . . . ." 28 U.S.C. § 1927. However, because our adversarial legal system is premised on

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[12] The '370 Defendants who move for sanctions include: William G. Schaeffer, Boats, Inc., Brian Olson, Donald C. Mackenzie, MarineOne Corp., Tony Lumpkin, Custom Fiberglass Manufacturers, Inc., Frank Franklin, Killinger Marine Center, Inc., Douglass Killinger, Phil Dill Boats, Inc., Phil Dill, Jr., Port Harbor Marine, Inc., Robert Soucy, Russo's Marine Mart, Inc., Lawrence J. Russo, Sr., Summerville Marine, Inc., Cleveland Wilson, Texas Marine & Brokerage, Inc., Texas Marine of Houston, Inc., Texas Marine of Clear Lake, Inc., Michael Hebert, Crocker's Marine Inc., Crocker & Co. L.L.C., Morehead Marine Inc., Newland Kay Crocker, and Terry G. Wilder.

zealous advocacy, sanctions are appropriate only when an attorney intentionally and recklessly disregards his duties to the court, as viewed from an objective standard. *See Lee v. First Lenders Ins. Servs., Inc.*, 236 F.3d 443, 445 (8th Cir. 2001); *Ringsred v. City of Duluth*, 187 F. Supp. 2d 1141, 1166 (D. Minn. 2001). The imposition of sanctions "is a serious matter and should be approached with circumspection." *O'Connell v. Champion Int'l Corp.*, 812 F.2d 393, 395 (8th Cir. 1987).

The line between being a zealous advocate and a vexatious lawyer has been stepped on in this case, but has not been stepped over. BDA and the '370 Defendants provide numerous examples of what they claim is improper behavior on attorney William French's part, including his motion for a preliminary injunction requiring BDA to pay Manion's salary, his initial motion to vacate the Arbitration Award, and his filing of the Amended Complaint in the '370 case. However, the Court is not in a position to determine whether the flames of this long-lived litigation were fanned by Manion or his counsel French. While some attorneys might question the efficacy of French's legal strategy, his actions do not reveal an intentional and reckless disregard of his duties to the court. Therefore, BDA's and the '370 Defendants' Motions for Sanctions are denied.

E. Miscellaneous Pending Motions

Two additional motions remain: (1) BDA's Motion for Entry of Default Judgment ['238 Docket No. 133]; and (2) the '238 Defendants' Motion to Stay Discovery ['238 Docket No. 128]. In light of the above analysis, the issue of whether BDA is entitled to default judgment is not reached. Additionally, the '238 Defendants' Motion to Stay Discovery is denied as moot.

IV. CONCLUSION

Based on the foregoing, and all the files, records and proceedings herein, **IT IS HEREBY ORDERED** that:

1. The '238 Defendants' Renewed Motion to Dismiss [No. 00-238 Docket No. 148] is **GRANTED,**

2. The '238 Defendants' Motion to Dismiss Boat Dealers' Alliance, Inc.'s Cross-Claim [No. 00-238 Docket No. 139] is **GRANTED,**

3. Plaintiff's Complaint [No. 00-238 Docket No. 1] is **DISMISSED WITH PREJUDICE,**

4. Boat Dealers' Alliance, Inc.'s Cross-Claim [No. 00-238 Docket Nos. 88, 111] is **DISMISSED WITH PREJUDICE,**

5. Boat Dealers' Alliance, Inc.'s Motion for Attorneys' Fees [No. 00-238 Docket No. 113] is **GRANTED IN PART,** and **DENIED IN PART,**

6. The '370 Defendants' Motion for Attorneys' Fees [No. 02-370 Docket Nos. 110, 113] is **DENIED,**

7. Boat Dealers' Alliance, Inc.'s Motion for Sanctions [No. 00-238 Docket No. 116] is **DENIED,**

8. The '370 Defendants' Motion for Sanctions [No. 02-370 Docket Nos. 104, 108] is **DENIED,**

9. BDA's Motion for Entry of Default Judgment [No. 00-238 Docket No. 133] is **DENIED,**

10. The '238 Defendants' Motion to Stay Discovery in Federal Court [No. 00-238 Docket No. 128] is **DENIED.**

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

/s/ _____
ANN D. MONTGOMERY
UNITED STATES DISTRICT JUDGE

Date: February 5, 2004

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Civil No. 00-238 ADM/RLE,
Civil No. 02-370 ADM/RLE

[Filed June 20, 2003]

Patrick T. Manion, Jr.,
Plaintiff,

v.

Stephen E. Nagin, et al.,
Defendants.

Patrick T. Manion, Jr. and Nancy Manion,
Plaintiffs,

v.

Alex Stirling et al.,
Defendants.

ANN D. MONTGOMERY
UNITED STATES DISTRICT JUDGE

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

On May 9, 2003, the Amended Motion to Dismiss for Lack of Jurisdiction ['370 Docket No. 80] of Defendants Alex Stirling, Bruce Marine, Inc., Bruce Crowder, Tom Crowder, Cope Auto & Marine, Inc., Kenneth Cope, Counce Marine, Inc., Tandy Counce, "Just Add Water" Boats, Inc., Tim Meyer, Norris Marine Ltd., and Tom Stidham (collectively, "Jurisdiction Defendants"), the Motion to Dismiss for Failure to State a Claim or, in the Alternative, for Summary Judgment ['370 Docket No. 81] of all Defendants in case number 02-370 (collectively, the "'370 Defendants") and the Motion for Order Vacating Arbitration Awards Dated November 12, 2002 and February 21, 2003 ['238 Docket No. 96] of Plaintiff Patrick T. Manion ("Manion") were argued before the undersigned United States District Judge. Also pending are the Motion to Dismiss ['370 Docket No. 45] of Defendants Beaver Park Marina, William G Schaeffer, Boats, Inc., Brian Olson, Donald C. MacKenzie, Tony Lumpkin, Cope Auto & Marine, Custom Fiberglass, Frank Franklin, Killinger Marine, Douglass Killinger, Phil Dill Boats, Inc., Cleveland Wilson, Texas Marine, Texas Marine Houston, Texas Marine Clear, Michael Hebert (collectively, the "Motion 45 Defendants") and the Motion to Lift Stay of Proceedings and to Confirm Arbitration Award ['238 Docket No. 84] of Defendant Boat Dealers' Alliance ("BDA").

II. BACKGROUND

Manion was terminated from his position as Executive Director of BDA at an emergency shareholders meeting on February 13, 1999. Manion filed this action on February 1, 2000, alleging, *inter alia*, that the termination was improper.

This Court granted BDA's motion to compel arbitration in its August 2, 2000 Order [Docket No. 68]. Extensive discovery was conducted, and the arbitration hearing (the "hearing") was held in Minneapolis, Minnesota, from May 29 to June 7, 2002, before Arbitrator Richard Pemberton (the "Arbitrator"). After time extensions were granted, post-arbitration briefs were submitted by the parties on September 9, 2002, with rebuttal submissions filed on October 7, 2002. After these submissions, the hearing was closed pending the need for further oral argument or an order for further written submissions by the Arbitrator. In his June 11, 2002 letter to counsel the Arbitrator specified that "[f]urther proceedings respecting costs, disbursements and attorney fees award will be needed *after* prevailing party is determined." Wackman Aff. Ex. 1 (emphasis added).[1]

On November 12, 2002, the Arbitrator issued his Findings of Fact, Conclusions of Law and Interim Arbitration Award ("Interim Award"). *Id.* Ex. 2. The Arbitrator determined that "Manion engaged in bad faith and in grossly negligent conduct" by (1) failing to deduct operating expenses when making dividend payments to BDA's members, (2) failing to deduct operating expenses in calculating his own compensation, and (3) withholding financial information in his possession that would have revealed his bad faith. *Id.* at 8-12. Based on these findings of fact, in his Interim Award, the Arbitrator concluded "adequate justification for BDA's [terminating Manion] exists," and Manion's breach of contract claim was denied. *Id.* at 12, 21. The Arbitrator also denied Manion's conversion claim holding that Manion was

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[1] As there are multiple "Wackman Affidavits" submitted for this case, all citations herein to a Wackman Affidavit refer to the affidavit filed April 29, 2003 ['238 Docket No. 103].

the owner of 90 shares of preferred stock in BDA and that such stock had never been converted. *Id.* at 12, 21-22.

On February 21, 2003, the Arbitrator issued his Final Award ("Final Award"), fully incorporating the Interim Award (collectively, the "Awards"). Wackman Aff. Ex. 6. The Final Award added to the determinations of the Interim Award "amounts of principal and interest pertaining to the preferred stock dividends and unpaid salary of [Manion]." *Id.* at 1. The Interim Award instructed the parties to "meet and confer" concerning related questions, and if an agreement could not be reached regarding the amounts owed, to petition the Arbitrator for a determination by filing written submissions. *Id.* at 1-2. BDA filed such submissions to the Arbitrator; Manion did not, but filed a January 21, 2003 letter to the Arbitrator making various objections to the Award as to positions of BDA. *Id.* at 2-3. The additions to the Interim Award encompassed in the Final Award relate only to the resolution of the amounts owing on Manion's preferred dividends and compensation, and to determining the prevailing party for purposes of an attorney fees award. *Id.* at 3, 6.[2] The Arbitrator found that BDA was the prevailing party on the "most significant issue of the arbitration," and declined

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[2] The Arbitrator found that Manion was owed $41,191.00 in past due wages and $12,670.00 in preferred dividends, but that such amounts were offset by Manion's overpayment to himself of preferred dividends and compensation prior to his termination of an amount exceeding the amount owed by $28,763.00. The Arbitrator held that BDA is entitled to "credit in that amount to be applied to future preferred dividends, if any, coming due and payable to [Manion]." Wackman Aff. Ex. 6 at 3 (Final Award).

to award attorney fees in part. *Id.* at 6, 7.[3] BDA argues that these determinations are consistent with the June 11, 2002 letter where the Arbitrator reserved these issues for determination after liability was assessed.

Manion asserts that the Awards should be vacated because the Hearing was not conducted under the rules specified in the Confidential Long-Term Management Agreement between Manion and BDA (the "Agreement") and he alleges the Awards "do not draw their essence from the Agreement." Pl.'s Mem. at 2; *see* Wackman Aff. Ex. 8 (Management Agreement).

III. DISCUSSION

A. Arbitration Award

Under the Federal Arbitration Act ("FAA"), "[a] court's review of an arbitration is very limited." *Gas Aggregation Servs., Inc. v. Howard Avista Energy, LLC*, 319 F.3d 1060, 1064 (8th Cir. 2003); 9 U.S.C. §§ 1-16. "Where parties agree to arbitrate, a court cannot substitute a judicial determination for the arbitrator's decision." *Gas Aggregation*, 319 F.3d at 1064. The merits of an arbitration award cannot be reviewed by a court "even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract." *Id.* (internal citation omitted). "Even if the court is convinced that the arbitrator committed serious error, so 'long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his

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[3] Attorney fees were awarded to one law firm involved in the case, however, as well as costs. *Id.* at 7-8.

authority,' arbitration awards must be confirmed." *Id.* (internal citation omitted).

The four circumstances delineated in the FAA which allow vacating an arbitration award are:

> (1) where the award was procured by corruption, fraud, or undue means;
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a) (2003); *see also Val-U Constr. Co. of S.D. v. Rosebud Sioux Tribe*, 146 F.3d 573, 578-79 (8th Cir. 1998). Two other "extremely narrow" extra-statutory standards for vacating an award derive from case law:

> (5) where an arbitrator's decision is completely irrational, or
>
> (6) where an arbitrator's decision evidences a manifest disregard for the law.

See Hoffman v. Cargill, Inc., 236 F.3d 458, 462 (8th Cir. 2001); *Val-U*, 146 F.3d at 578 (*citing Kiernan v. Piper Jaffray Cos.*, 137 F.3d 588, 594 (8th Cir. 1998)). "An

arbitration decision may only be said to be irrational where it fails to draw its essence from the agreement, and an arbitration decision only manifests disregard for the law where the arbitrators clearly identify the applicable, governing law and then proceed to ignore it." *Hoffman*, 236 F.3d at 461-62.

None of the statutory or extra-statutory grounds for vacating the Arbitrator's award exist in this case. There are no allegations of corruption, fraud, undue means or partiality. Manion has identified no request for postponement not granted, nor any evidence sought to be presented that was not received by the Arbitrator. Neither party asserts challenges that a final, definite award has been made.

Manion argues that the Arbitrator exceeded the 30-day period in which an award must be issued after receipt of the post-hearing briefs. The hearing was declared closed by the American Arbitration Association ("AAA") on October 11, 2002. Def. Ex. 41. On November 11, 2002, the AAA advised the parties that additional time was required by the Arbitrator and that the award would be due November 13, 2002. *Id.* Ex. 42. The parties agreed, and the Interim Award was issued on November 12, 2002. *Id.* Ex. 43. The Interim Award was therefore timely.

Manion also argues that only one award is allowed under the Employment Rules, and thus the "interim" award was unwarranted and a fatal flaw in the arbitration process. The issuance of an Interim and a Final Award in this case does not meet any of the criteria for vacating the Awards. The necessity of a Final Award determining the damages issues was identified in the Arbitrator's June 11, 2002 letter, and the bifurcated method prejudiced no party. The Final Award did not alter or change the liability conclusions of the Interim

Award, but merely added to it the damage calculations which had been reserved for consideration after the prevailing party analysis had been decided. The parties were accorded a full opportunity to submit post-Interim Award briefs and letters as to damages in light of the Interim Award finding the Defendant to be the prevailing party.

Manion alleges that the Arbitrator's Awards fail to draw from the essence of the Agreement and are therefore "completely irrational." Manion argues that the Arbitrator did not use the proper rules, the Employment Rules (as opposed to the Commercial Rules), in reaching his Awards. Manion's position is that "[b]ecause the [A]rbitrator ignored those rules, the Awards are void ab initio." Pl's. Mem. in Supp. at 10. Because no specific reference to the Employment Rules was made by the Arbitrator, Manion argues his Awards were made in violation of the rules. This conclusion does not necessarily entail. Manion alleges that the Arbitrator did not orally specify the governing rules when asked, and therefore the Arbitrator's procedure violated due process norms. This error is alleged to have placed the Arbitrator's Awards beyond the dictates of the Agreement. *Boise Cascade Corp. v. Paper, Allied-Indus., Chem., and Energy Workers (PACE), Local 7-0159*, 309 F.3d 1075, 1082, 1084 (8th Cir. 2002) (holding that an arbitrator's award must draw its essence from the contract and not reflect the arbitrator's "own brand of industrial justice"). Manion also alleges that the Arbitrator ignored the effect of Article VI, section 1, of the BDA's By-Laws on Manion's duties and actions.[4] Wackman Aff. Ex. 9

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[4] Manion argues that BDA By-Laws Article VI, section 1, requires BDA's Members to decide whether or not to deduct expenses prior to dividend disbursement. BDA By-Laws, VI(1) ("A majority of all the stockholders voting may from time-to-time, determine the rate of monthly dues or other periodic or special

(BDA By-Laws); Pl.'s Mem. in Supp. at 22. However, an award may not be vacated, even if a District Court disagrees with the arbitrator's interpretation of a contract, "unless that interpretation so directly contradicts the plain meaning of the parties' agreement that it effectively rewrites it." *Boise Cascade*, 309 F.3d at 1081. The Court finds no reason to disagree with the Arbitrator's interpretation of the Agreement. The Arbitrator referenced relevant provisions of the Agreement and By-Laws in making the Interim Award, and there is no basis on which to conclude the Arbitrator did not fully consider all appropriate provisions, even if he did not explicitly cite them, in making his determinations. *See* Interim Award at 5-6 (discussing BDA By-Laws Article VII and the Agreement, sections 6(A) and 6(B)) (Wackman Aff. Ex. 2). The alleged failures of the Arbitrator to honor the essence of the Agreement fall far short of "effectively rewriting" the Agreement, and the Awards are not "completely irrational." *Boise Cascade*, 309 F.3d at 1081.

Nor do the Awards evidence a manifest disregard for the law. Such a finding requires "some showing in the record, other than the result obtained, that the arbitrator[] knew the

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dues, fees, charges, or assessments to be paid by the Members to assist in the [sic] financing the operations of the corporation."). Manion argues that By-Law VI(1) is thus a condition precedent to the deduction of expenses under Article VII, section 2 ("There shall be distributed on a patronage basis to such Members of the corporation in a manner taking into account the amount of business done by BDA with each of them, all the net savings and overcharges effected by or resulting from the operations conducted . . . by BDA in connection with the sales of marine equipment . . . made by BDA to such Members for resale by them which remain after paying all operating and administration expenses of BDA . . . .").

law and expressly disregarded it." *Marshall v. Green Giant Co.*, 942 F.2d 539, 550 (8th Cir. 1991) (internal citation omitted). No such showing has been made by Manion.

The process employed to allow all parties to fully argue and brief their positions in this arbitration was extensive. The proceeding "continued over many months" with a "full range of discovery proceedings and motion practice." Interim Award at 2. The arbitration hearings spanned the course of seven days, involving a number of witnesses testifying and the receipt of 191 numbered exhibits. *Id.* While not always the case in arbitration proceedings, the procedural complexity of this arbitration was "comparable to complex litigation in United States District Court." *Id.* In making the Interim Award, the Arbitrator included a memorandum describing the process. He began by noting that the arbitration was pursued by both parties' counsel "with incredible energy and determination." *Id.* at 24. Manion alleges that the Arbitrator failed to take into account the actions of the Defendants in his analysis, and that such determination is essential to the resolution of Plaintiffs' present charges. The Arbitrator stated that he gave "the most serious consideration" to any justifications of Manion's failure to recognize the necessity of dealing with expenses in computing dividend payments, and that he gave Manion "every consideration in this regard, because the stakes are high." *Id.* at 25. The Arbitrator stated:

> I very seriously considered whether or not the conduct of the BDA Officers and Directors could be considered because, if they knew or should have known that they were receiving dividends without deduction of expenses, I am hard put to excuse their conduct in accepting those distributions. If they were without the financial information which they claimed not to have for as long a period of time as they said

> they did not have it, it is hard to excuse their failure to have acted sooner than they did to demand such information. However, the law is clear to me that BDA's failures, no matter how hard to excuse, do not work to change the fact or legal effect of Manion's conduct . . . .

Id. at 26-27.

Manion concedes that all relevant information was presented to the Arbitrator. May 9, 2003 Hearing. While Manion alleges that the Arbitrator did not consider certain arguments, no material has been identified that was not fully presented to the Arbitrator that would be presented in trial. Accordingly, the Arbitrator had before him the entire record of Manion's evidence and arguments prior to making his Awards. The Eighth Circuit has cautioned that "[a]rbitration is not a perfect system of justice, nor [is it] designed to be." *Hoffman*, 236 F.3d at 462 (internal citation omitted). "[W]here arbitration is contemplated the courts are not equipped to provide the same judicial review given to structured judgments defined by procedural rules and legal principles. Parties should be aware that they get what they bargain for and that arbitration is far different from adjudication." *Id.* (internal citation omitted). Here, the parties nonetheless received an arbitration process very similar to that expected in litigation, and more than is ordinarily required of this alternative "short cut" to dispute resolution. While the intensity and complexity of the proceedings in this case were high, ordinarily "[a]rbitration is designed primarily to avoid the complex, time-consuming and costly alternative of litigation." *Id.* "In the arbitration setting we have almost none of the protections that fundamental fairness and due process [usually] require . . . . Discovery is abbreviated if available at all. The rules of evidence are employed, if at all, in a very

relaxed manner. The factfinders . . . operate with almost none of the controls and safeguards [expected in litigation]." *Id.* at 462-63 (citing *Lee v. Chica*, 983 F.2d 883, 889 (8th Cir. 1993) (Beam, J. concurring in part and dissenting in part). Arbitrators need not even articulate the reasons for their decisions. 236 F.3d at 463.

Here, the parties submitted to arbitration and were afforded a complete opportunity to present information to the Arbitrator. "Having entered such a contract, a party must subsequently abide by the rules to which it agreed." *Id.* The Arbitrator also gave an extensive explanation of his reasons for his decisions. Wackman Aff. Exs. 2, 6 (Interim and Final Awards). None of the statutory grounds for vacating the award exist. *Delta Mining Holding Co. v. AFC Coal Props., Inc.*, 280 F.3d 815, 820 (8th Cir. 2001) (holding that "[i]t is well-settled that only the statutory grounds in § 10(a) of the Act justify vacating an award; arbitration rules and ethical codes 'do not have the force of law'") (internal citation omitted). Manion has not identified any specific Employment Rule that the Arbitrator violated or failed to apply, nor was any such violation raised or identified during the arbitration proceedings. Even if one existed, the statutory grounds are still the only grounds for vacating an award. *See Montez v. Prudential Secs., Inc.*, 260 F.3d 980 at 984 (8th Cir. 2001) ("[A] federal court cannot vacate an arbitration award based on a failure to disclose merely because an arbitrator failed to comply with [National Association of Securities Dealers] rules."). Manion's failure to identify a particular Employment Rule not applied has also not been shown to prejudice Manion or to have affected the outcome of the arbitration. *Delta Mining*, 280 F.3d at 823 (holding that vacating an award under §§ 10(a)(1) and (3) requires a showing that "the [Arbitrator's] conduct influenced the outcome of the arbitration").

In sum, this Court is left with no reason to vacate the Arbitrator's Awards under the permissible statutory and extra-statutory grounds. The Arbitrator's actions meet the standard of "arguably construing or applying the contract and acting within the scope of his authority." *Gas Aggregation*, 319 F.3d at 1064. For the reasons stated above, Manion's Motion for Order Vacating Arbitration Awards Dated November 12, 2002 and February 21, 2003 is denied.

B. Motion to Dismiss

A party may move to dismiss claims for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). In considering a motion to dismiss, the pleadings are construed in the light most favorable to the non-moving party, and the facts alleged in the complaint must be taken as true. *Hamm v. Groose*, 15 F.3d 110, 112 (8th Cir. 1994); *Ossman v. Diana Corp.*, 825 F. Supp. 870, 879-80 (D. Minn. 1993). Any ambiguities concerning the sufficiency of the claims must be resolved in favor of the non-moving party. *Ossman*, 825 F. Supp. at 880. A complaint should be dismissed only if it is clear that no relief can be granted under any set of facts that could be proved consistent with the allegations. *Hafley v. Lohman*, 90 F.3d 264, 266 (8th Cir. 1996); *Frey v. City of Herculaneum*, 44 F.3d 667, 671 (8th Cir. 1995) (citations omitted). "A motion to dismiss should be granted as a practical matter . . . only in the unusual case in which the plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *Frey*, 44 F.3d at 671.

Patrick Manion alleges claims for tortious interference with contract (Count I), conversion (Count III), securities fraud (Count IV), breach of fiduciary duty (Count V) and

unjust enrichment (Count VI). Patrick and Nancy Manion together allege claims for tortious interference with prospective business relationships (Count VIII), intentional infliction of emotional distress (Count IX), negligent infliction of emotional distress (Count X) and conspiracy (Count XI). Nancy Manion alleges claims for tortious interference with an employment-at-will relationship (Count II) and intrusion into seclusion (Count VII). Am. Compl. ['370 Docket No. 41].

Collateral estoppel applies to a party's claims when:

> (1) the issue sought to be precluded is identical to the issue previously decided; (2) the prior action resulted in a final adjudication on the merits; (3) the party sought to be estopped was either a party or in privity with a party to the prior action; and (4) the party sought to be estopped was given a full and fair opportunity to be heard on the issue in the prior action.

Wellons, Inc. v. T.E. Ibberson Co., 869 F.2d 1166, 1168 (8th Cir. 1989). An arbitration award is a prior adjudication for collateral estoppel purposes. *Mandich v. Watters*, 970 F.2d 462, 465 (8th Cir. 1992).

The '370 Defendants argue that Plaintiffs' claims are collaterally estopped because the issues in this lawsuit were adjudicated by the Arbitrator. The parties agree that the threshold question is whether or not Manion received a "full and fair" hearing in the arbitration process. Plaintiffs assert the arbitration procedures they submitted to were not fair and adequate, and that redetermination of the issues is warranted. *Montana v. United States*, 440 U.S. 147, 164 n.11, 99 S. Ct. 970, 59 L. Ed. 2d 210 (1979) ("Redetermination of issues is warranted if there is reason to doubt the quality,

extensiveness, or fairness of procedures followed in prior litigation."). For the reasons discussed above, this Court does not doubt the quality, extensiveness or fairness of the procedures involved in the arbitration proceedings. Again, Plaintiffs argue that the Arbitrator did not consider the BDA Members conduct in making his determinations, but only focused on the conduct of Manion. Plaintiffs concede that the evidence relevant to the conduct of the Members was presented and discussed in the arbitration, but argue that it was "ignored and not considered" by the Arbitrator. May 9, 2003 Hearing. No authority has been cited that the failure to mention or discuss particular evidence presented to an arbitrator during the course of a lengthy and in-depth arbitration proceeding yields the conclusion that such evidence was ignored or not considered by the arbitrator in reaching his determinations. Accordingly, all legal or factual issues determined by the Arbitrator that were essential to his Awards are collaterally estopped. *Mandich*, 970 F.2d at 465.

Plaintiffs identify the securities fraud claim (Count IV), the breach of fiduciary duty claim (Count V), the unjust enrichment claim (Count VI) and the conspiracy claim (Count XI) as being not determined by the Arbitrator's findings. May 9, 2003 Hearing. By implication Plaintiffs concede that Manion's claim for tortious interference with contract (Count I) and conversion (Count III) involve issues determined by the Arbitrator. Because the arbitration proceeding was a full and fair hearing, Counts I and III are collaterally estopped. Patrick and Nancy Manion's alleged claim for tortious interference with prospective business relationships (Count VIII) is duplicative of Manion's tortious interference and conversion claims and is also estopped. Nancy Manion's claim for tortious interference with an employment-at-will relationship (Count II) is based on the alleged "termination of Manion for improper reasons." Pls.' Mem. in Opp. at 27.

The propriety of Manion's termination was specifically determined by the Arbitrator; therefore, Count II is collaterally estopped.

The securities fraud claim (Count IV) is predicated on Manion's contention that his stock was converted. The Arbitrator specifically held that Manion's stock was not converted. Count IV is thus collaterally estopped. The breach of fiduciary duty claim (Count V) relates to the termination and/or the alleged conversion of stock. However, the Arbitrator decided each of these issues against Manion in his Awards, therefore Count V is collaterally estopped and dismissed. The unjust enrichment claim (Count VI) turns on Manion's allegation that Defendants engaged in bad faith, deceitful and fraudulent conduct, thereby unjustly benefitting from their wrongful conduct. These issues also directly relate to the justification for Manion's termination and the alleged stock conversion. Such conduct was discussed by the Arbitrator and Manion's position was rejected. This claim is collaterally estopped and Count VI is dismissed.

Plaintiffs' intentional and negligent infliction of emotional distress claims (Counts IX and X), as well as Nancy Manion's intrusion into seclusion claim (Count VII), have been withdrawn by the Plaintiffs and are hereby dismissed. Defs. Mem. in Opp. at 30. The only issue regarding these claims is whether they are dismissed with or without prejudice. Plaintiffs seek to voluntarily dismiss these claims without prejudice. "A decision whether to allow a party to voluntarily dismiss a case rests upon the sound discretion of the court." *Hamm v. Rhone-Poulenc Rorer Pharms., Inc.*, 187 F.3d 941, 950-51 (8th Cir. 1999). "Once an answer or a motion for summary judgment has been filed, an action may be dismissed at the plaintiff's request only upon order of the court and upon such terms and conditions as the court deems proper."

Id. Thus, absent court order, Plaintiffs have no right to a voluntary dismissal without prejudice where the dismissal was not sought until after Defendants' Motion to Dismiss or for Summary Judgment was filed. *See id.*

The intrusion into seclusion claim is predicated on external surveillance of the BDA office in which Nancy Manion worked. "Intrusion upon seclusion occurs when one 'intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns . . . if the intrusion would be highly offensive to a reasonable person.'" *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 233 (Minn. 1998) (internal citation omitted). However, surveillance of public activities is not generally regarded as a basis for a claim of intrusion into seclusion. *See, e.g., Furman v. Sheppard*, 130 Md. App. 67, 744 A.2d 583, 586-87 (Md. App. 2000). Plaintiffs do not allege the surveillance of Nancy Manion in any private place. "There is no liability for observing [Plaintiff] in public places since [she] is not then in seclusion." 744 A. 2d at 586. Count VII is dismissed.

Defendants' argue the intrusion into seclusion and intentional infliction of emotional distress claims are time-barred, which buttresses their position that the dismissal should be with prejudice. Intrusion into seclusion is also an intentional tort with a two-year statute of limitations. Minn. Stat. § 541.07(1); *see, e.g., Bailer v. Erie Ins. Exchange*, 344 Md. 515, 687 A.2d 1375, 1381, 1381 n.4 (Md. 1997). The alleged surveillance occurred in October 1998, more than three years prior to the February 12, 2002 filing of the '370 Complaint alleging a violation of intrusion into seclusion. Thus, the statutory time bar to Count VII requires it be dismissed with prejudice. The same two-year statute of limitations applies to the intentional infliction of emotional

distress claim (Count IX). Minn. Stat. § 541.07(1). This claim arises out of the same operative facts as the intrusion claim, and Count IX was also alleged in the February 12, 2002 Complaint in the '370 case. This claim is also time-barred. Nevertheless, Defendants were forced to bring a summary judgment motion regarding this claim as well. Accordingly, this Count IX is dismissed with prejudice.

The negligent infliction of emotional distress claim (Count X) does not involve allegations that Plaintiffs suffered physical injury contemporaneous with Defendants' alleged breach of duty. In such case, "a person within the zone of danger of physical impact who reasonably fears for his or her own safety and who consequently suffers severe emotional distress with resultant physical injury may recover." *Stadler v. Cross*, 295 N.W.2d 552, 553 (Minn. 1980) (internal citation omitted). A plaintiff may also recover, absent a physical injury, for "mental anguish or suffering for a direct invasion of his rights, such as defamation, malicious prosecution, or other willful, wanton or malicious conduct." *Bohdan v. Alltool Mgf., Co.*, 411 N.W.2d 902 at 907 (Minn. Ct. App. 1987). Here, Plaintiffs were never in the "zone of danger" of any imminent physical impact or injury. The only evident basis for a "direct invasion of rights" claim is Nancy Manion's claim for intrusion into seclusion, which has been dismissed. Accordingly, this claim is not viable and Count X must be dismissed with prejudice.

The conspiracy claim (Count XI) is "based on the commission of an underlying tort . . . ." *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 551 (8th Cir. 1996). Since Plaintiffs' other claims have been dismissed and no underlying tort is viable, Count XI must also be dismissed.

Plaintiffs' punitive damages claims were prematurely plead and are rendered moot by the dismissal of the Amended Complaint. Minn. Stat. § 549.191; Defs.' Mem. in Opp. at 30.

C. Personal Jurisdiction

In light of the above rulings, the jurisdiction Motion is not reached.

IV. CONCLUSION

Based on the foregoing, and all the files, records and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Manion's Motion for Order Vacating Arbitration Awards Dated November 12, 2002 and February 21, 2003 ['238 Docket No. 96] is **DENIED**,

2. The '370 Defendants' Motion to Dismiss for Failure to State a Claim or, in the Alternative, for Summary Judgment ['370 Docket No. 81] is **GRANTED**,

3. Plaintiffs' Amended Complaint ['370 Docket No. 41] is **DISMISSED WITH PREJUDICE**,

4. The Jurisdiction Defendants' Amended Motion to Dismiss for Lack of Jurisdiction ['370 Docket No. 80] is **DENIED AS MOOT**,

5. The Motion 45 Defendants' Motion to Dismiss ['370 Docket No. 45] is **GRANTED**,
6. BDA's Motion to Lift Stay of Proceedings and to Confirm Arbitration Award ['238 Docket No. 84] is **GRANTED**, and

7. Manion's Complaint ['238 Docket No. 1] is **DISMISSED WITH PREJUDICE**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

/s/ _____
ANN D. MONTGOMERY
UNITED STATES DISTRICT JUDGE

Date: June 20, 2003

APPENDIX E

AMERICAN ARBITRATION ASSOCIATION

[February 21, 2003]

RE: 65 160 00018 00

In the Matter of the Arbitration between

Patrick T. Manion, Jr.)
)
v.)
)
Boat Dealers' Alliance, Inc.)
)

FINAL AWARD

The undersigned Arbitrator's Findings of Fact, Conclusions of Law and Interim Arbitration Award were entered the 12th day of November, 2002. The Interim Arbitration Award is incorporated in this Final Award by reference, as fully as if restated verbatim herein.

In pertinent part, the Interim Arbitration Award stated that the Award was interim in view of the need for legal counsel of the parties to meet and confer respecting amounts of principal and interest pertaining to preferred stock dividends and unpaid salary of Claimant. More particularly, at **Findings of Fact with Discussion of Legal Authorities I** (p.19) it is stated:

"This Interim Award instructs the parties to meet and confer concerning the questions of unpaid Executive Director salary and unpaid preferred stock dividends owing to Manion. . . . The parties have been given the opportunity to meet and confer to work out any details in these regards and to be heard further if they are unable to do so".

At paragraphs 7 and 8 of the Conclusions of Law and Provisional Arbitration Award it was stated:

> "Counsel for the parties are instructed to communicate and attempt to arrive at agreement as to amount and terms of payment thereof and upon failing to do so may petition the Arbitrator for determination thereof by simultaneous submission of a written position papers, which written position papers are due by simultaneous submission to the Arbitrator, and AAA 30 days subsequent to receipt of this Interim Award. Oral presentations will be heard as "scheduled by AAA via telephone conference as soon as possible after receipt of the written position papers.
>
> 8. Manion is entitled to any unpaid salary through the date of his termination together with interest thereon at the legal rate from the date said salary payments should have been made. Counsel for the parties are instructed to communicate and attempt to arrive at agreement as to amount and terms of payment thereof and upon failing to do so may petition the Arbitrator for determination thereof. Counsel for the parties are instructed to communicate and attempt to arrive at agreement as to amount and terms of payment thereof and upon failing to do so may petition the arbitrator for determination thereof by simultaneous submission of a written position paper, which written position

papers are due by simultaneous submission to the Arbitrator and AAA 30 days subsequent to receipt of this Interim Award. Oral presentations will be heard as scheduled by AAA via telephone conference as soon as possible after receipt of the written position papers".

The undersigned Arbitrator received Respondent's Post-Decision Brief on Past Due Wages and Preferred Dividends Owed to Claimant in timely fashion. No such submission was received from Claimant.

A telephone conference was conducted January 7, 2003 to determine whether Claimant wished to be heard as directed in the Interim Arbitration Award on the issues specified therein. The undersigned Arbitrator granted Claimant's counsel until January 21, 2003 to make any further submission Claimant desired. By letter dated January 21, 2003 Claimant counsel raised various issues in the nature of objection to the handling of the Arbitration by the undersigned Arbitrator including, inter alia that, "there was no rationale reason to reserve the right to reopen the record and the hearing, as you did in the Award. That is because sufficient undisputed evidence was presented at the hearing upon which to base an award". Claimant's submission then went on to reiterate its position as stated prior to the issuance of the Interim Arbitration Award. Claimant's January 21, 2003 submission did not address Respondent's Post-Decision Brief On Any Past-Due Wages and Preferred Dividends Owed to Claimant nor did it address BDA's Post-Arbitration Hearing Brief Regarding Attorney's Fees, which post-decision submissions of Respondent therefore stand uncontroverted.

Claimant made a claim for Forty-one Thousand One Hundred Eighty-One and 00/100 Dollars ($41,181.00) in past

due wages and, I find had a claim for Twelve Thousand Six Hundred Seventy and 00/100 Dollars ($12,670.00) in preferred dividends. However these amounts are subject to an offset caused by Claimant's overpayment to himself of preferred dividends and compensation due to his failure to first deduct operating expenses before making such payments to himself. This offset exceeds the amount owed by Twenty-eight Thousand Seven Hundred Sixty-three and 00/100 Dollars ($28,763.00) and Respondent is entitled to credit in that amount to be applied to future preferred dividends, if any, coming due and payable to Claimant.

This Finding and Conclusion is supported by Arbitration Exhibit 132, the April 5, 1999 report from BDA's Finance Committee which demonstrates that Claimant had already been credited with the Forty-one Thousand One Hundred Eighty-one and 00/100 Dollars ($41,181.00) in past due wages and that the amounts Claimant continues to owe BDA exceed the amount of unpaid preferred dividends. (Wackman Aff., Ex.F.). First, in Schedule 1 of the Compensation Report (this Report is the first attachment to the April 5 letter) it shows that for the year ended June 30, 1997, Manion's failure to deduct operating expense's resulted in an overpayment to the preferred shareholders of Twenty-eight Thousand Seven Hundred Fifty-four and 00/100 Dollars ($28,754.00), of which Twenty Thousand One Hundred Twenty-Eight and 00/100 Dollars ($20,128.00) reflects Manion's 70% of the preferred shareholder's dividends[1]. Schedule 2 covers the

[1] As reflected in Schedule 1, Manion's calculation of his own compensation for 1997 was also off by $43,131.00 in his favor. However, because his compensation under that calculation was less than $110,000.00, Manion simply paid himself the $110,000.00 as provided for by paragraph 6A of his Management Agreement, and thus, there was no overpayment of his compensation in 1997.

period ending June 30, 1998 and shows that Manion's base compensation was overpaid by Forty-Nine Thousand Seven Hundred Thirty-three and 00/100 ($49,733.00). This was again caused by his failure to deduct operating expenses. However, as can be seen in Schedule 2, Manion is credited with a payable of Forty-one Thousand One Hundred Eighty-one and 00/100 Dollars ($41,181.00) leading to an overpayment of his base compensation of Eight Thousand Five Hundred Fifty-Two and 00/100 Dollars ($8,552.00) ($49,733.00-$41,181.00). Schedule 2 also shows that Manion's preferred dividends were overpaid for 1998 by Twelve Thousand Seven Hundred Fifty-Three and 00/100 Dollars ($12,753.00). As a result, for the years ending 1997 and 1998, after crediting Manion with a Forty-one Thousand One Hundred Eighty-One and 00/100 Dollars ($41,181.00) account payable, Manion overpaid himself an additional Forty-One Thousand Four Hundred Thirty-Three and 00/100 Dollar ($41,433.00). Subtraction of Twelve Thousand Six Hundred Seventy and 00/100 Dollars ($12,670.00) in preferred dividends owed for the years 2000-2001 from Forty-One Thousand Four Hundred Thirty-three and 00/100 Dollars ($41,433.00) establishes that Claimant continues to owe Respondent Twenty-eight Thousand Seven Hundred Sixty-three and 00/100 Dollars ($28,763.00) which amount should be offset from any future preferred dividends due to Claimant.

The amounts owed to Claimant and the amounts owed by Claimant may be summarized as follows:

Item	Due Manion	Due BDA
Manion A/P as of 1/31/99	$41,181.00	
2000 Preferred Dividend	$ 3,127.00	
2001 Preferred Dividend	$ 9,543.00	
1998 Excess Compensation		$49,733.00
1997 Preferred Overpayment		$20,128.00
1998 Preferred Overpayment		$12,753.00
Net		**$28,763.00**

Accordingly it is concluded and ordered that Respondent is entitled to a credit of Twenty-Eight Thousand Seven Hundred Sixty-Three and 00/100 Dollars ($28,763.00) against future preferred dividends, if any, payable to Claimant.

Paragraph 9.D of the Management Agreement provides as follows:

> "If any dispute arising out of this Agreement results in arbitration, litigation, or appeal, the substantially prevailing party shall be entitled to repayment of reasonable attorneys fees and costs associated with such legal actions".

Under Florida law (which the Management Agreement expressly provides as the applicable law under which it shall be construed and interpreted) a "prevailing party" for purposes of an attorney's fee award is the party prevailing on the significant issues in litigation. *See Moritz v Hoyt Enterprises, Inc.*, 604 So.2d 807, 810 (Fla.1992). In breach of contract actions, only one party can "prevail" absent compelling or unusual circumstances. *See, e.g., Hutchinson v Hutchinson*, 687 So. 2d 912, 913 (Fla.Dist.Ct.App.1997);

Green Companies, Inc. v Kendall Racquetball Investment, Ltd., 658 So.2d 1119, 1121 (Fla.Dist.Ct.App.1995).

I find that the most significant issue of the arbitration has been the issue as to whether Respondent wrongfully terminated Claimant as its Executive Director. In the Interim Award I found no wrongful termination. In addition, in the Interim Arbitration Award, I found that there had been no conversion of Claimant's preferred stock in that he still owns that stock for whatever value it may have. It was not clear that the stock had any significant market value nor is it clear that the stock has significant value for purposes of dividend entitlement. Claimant's claims of damage entitlement related to past and future compensation and fringe benefits fell by virtue of the conclusion that he had not been wrongfully terminated, as did the claim for punitive damages. Therefore, I find and conclude that Respondent is "the substantially prevailing party" herein and is thus entitled to such attorneys' fees as I find to be reasonable and not speculative or conjectural.

I decline to award attorneys' fees attributable to former counsel Stephen Nagin, Gadsby Hannah and Cousineau, McQuire and Anderson. The basis for the denial is that I find the fair and reasonable value of such attorneys' fees to be speculative and conjectural under all of the circumstances. Respondent discharged two of these firms and the third withdrew shortly after being retained. The role of Nagin was significantly criticized by both parties. Respondent apparently found the work of Gadsby Hannah, even after a considerable period of representation, to be unsatisfactory to the point that Respondent was unwilling to go to hearing represented by that law firm and discharged it very near the scheduled hearing date, requiring a rescheduling of the hearing in order to

extend time to the next counsel for Respondent to become oriented on the file and ready to proceed. That extension was grudgingly granted to the firm of Cousineau, McGuire & Anderson which became unable to proceed any further and withdrew, requiring a further rescheduling of the hearing. I am not satisfied that value of the attorneys' services which generated the billing of these three firms' fees has been established sufficiently to justify an award.

It has been possible to evaluate the fair and reasonable value of the legal services provided by the Rider, Bennett law firm, because I personally observed the delivery of its legal services throughout the pre-hearing, hearing and post hearing phases of this arbitration. I find those services to be fair and reasonable as billed in the amount of One Hundred Fifty-one Thousand Five Hundred Sixteen and 50/100 Dollars ($151,516.50), as set forth in the Affidavit of Peter Gray which has been provided in support of the application for attorneys' fees.

Costs are less subjective than are attorneys' fees. Costs represent actual payout or due and payable obligations for value received. Therefore, I find the submitted costs in the amount of Seventy-Two Thousand Two Hundred Fifty-Four and 00/100 Dollars ($72,254.00) to be recoverable and award that amount in addition to the award of attorneys' fees of the Rider, Bennett law firm in the amount of One Hundred Fifty-one Thousand Five Hundred Sixteen and 50/100 Dollars ($151,516.50).

I also award the Arbitrator fees and expenses of this Arbitration together with the Administrative expenses of this Arbitration as billed or to be billed by American Arbitration Association to the parties. The Arbitrator's fees and expenses are as documented by his bill separately submitted to

American Arbitration Association and incorporated herein by reference.

Therefore, the administrative fees and expenses of the American Arbitration Association totaling $18,160.06 shall be borne as incurred. The Compensation and expenses of the Arbitrator totaling $32,735.07 shall be borne equally by the parties and deducted from deposits previously advanced the Association.

Dated this 21st day of February, 2003.

/s/_____
Richard L. Pemberton, Sr., Esq.
Arbitrator

APPENDIX F

AMERICAN ARBITRATION ASSOCIATION

[November 12, 2002]

RE: 65 160 00018 00

In the Matter of the Arbitration between

Patrick T. Manion, Jr.	)
	)
v.	)
	)
Boat Dealers' Alliance, Inc.	)
	)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND INTERIM ARBITRATION AWARD

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement dated March 17, 1996, entered into by the above-named parties, and having been duly sworn and having duly heard the proofs and allegations of the parties, hereby render this Interim Award as follows:

This matter came on for hearing before the undersigned beginning on May 29, and continuing through June 7, 2002. Claimant Patrick T. Manion, Jr. ("Manion") appeared personally and by his attorneys, William J. French and James

MacIntyre, Esqs. Respondent Boat Dealers' Alliance, Inc. ("BDA") appeared by Brian Olson, its Executive Director, and its attorneys Richard J. Nygaard and John J. Wackman, Esqs.

This Award is Interim in view of the need for legal counsel of the parties to meet and confer as provided in paragraphs 6 and 7 of the Conclusions of Law and Interim Arbitration Award respecting amounts of principal and interest pertaining to preferred stock dividends and unpaid salary of Claimant. Also, the parties will be heard pursuant to paragraph 10 of the Conclusions of Law and Interim Arbitration Award regarding attorney fees. In the event of inability of the parties to agree and discharge those provisions of the Award, written position statements and oral argument thereon will be heard and the contested issues will be determined in the final award; all as set forth in more detail hereafter.

This arbitration proceeding has continued over many months with a full range of discovery proceedings and motion practice comparable to complex litigation in United States District Court. These proceedings were conducted according to the wishes of the parties and their counsel. The undersigned Arbitrator ruled on various motions, conducted in-camera inspection of documents to resolve discovery disputes and conducted a number of pre-hearing conferences to deal with the many issues which arose. Respondent was represented by three different law firms during the course of the proceedings. The timetable schedule was amended from time to time to accommodate the requests of counsel. Ultimately, a seven-day hearing was conducted at which a number of witnesses testified and 191 numbered exhibits were marked. A court reporter transcript of the proceedings by Danielson Court Reporting was prepared which transcript

details the testimony of witnesses the identification of exhibits offered, received and withdrawn. Many of the exhibits contained multiple pages. Some exhibits consisted of entire notebooks. By agreement of counsel, each party submitted a post-hearing brief as well as a post-hearing reply brief and proposed Findings of Fact, Conclusions of Law and Arbitration Award. Study of the undersigned Arbitrator's minutes of the hearing, the 1,960-page transcript, the exhibits, all of the written submissions of the parties and Arbitrator independent legal research has consumed many hours.

Based upon the files, records, proceedings and deliberations herein, the undersigned makes the following Findings of Fact With Discussion of Legal Authorities, Conclusions of Law and Arbitration Award:

FINDINGS OF FACT WITH DISCUSSION OF LEGAL AUTHORITIES

I. THE PARTIES

1. Respondent BDA operates as a purchasing cooperative organized on behalf of its constituent members, a group of regionally based retail dealers in marine equipment and marine supplies. BDA is a Florida corporation that operates as a cooperative under particular provisions of Florida law. Because of this dual classification as a corporation and cooperative, the boat dealers associated with BDA are sometimes referred to as shareholders and other times as members. Claimant Manion is the founder of BDA and was its first Executive Director until his termination which has given rise to this arbitration as well as to litigation currently pending in the United States District Courts.

II. BDA IS CREATED.

2. In 1995, Manion, following a suggestion by his neighbor who was involved in a successful restaurant supply buying cooperative, decided to form a similar cooperative consisting of boat dealers. The proposed cooperative was conceived as an organization of boat dealers who could aggregate their purchasing power to obtain more favorable prices from manufacturers of marine equipment and supplies; hence, lowering the member dealers' costs and increasing their profits.

3. Manion, conceived of and formed BDA through his own efforts. Manion's concept for BDA and his efforts prior to July 1, 1995, in forming BDA had significant value.

4. Manion engaged Stephen Nagin ("Nagin") as his attorney to assist him in the formation and start-up of the proposed cooperative. In June 1995, Nagin incorporated BDA by preparing and filling Articles of Incorporation in the State of Florida. The Articles provided for the issuance of three types of stock, Preferred, Common and Capital, although no Capital stock was ever issued. The par value for each type of stock was $100.

III. BDA IS ORGANIZED AND THE BY-LAWS AND MANAGEMENT AGREEMENT ARE EXECUTED.

5. Following BDA's incorporation, Manion, with the assistance of potential members, began to solicit boat dealers to join BDA as members. By March 1996, fifteen members had joined BDA and attended the first meeting of the Board of Directors held on March 3, 1996 in Atlanta. At that meeting, the members elected a Board of Directors ("Board") and Officers ("Executive Committee"), approved the By-laws

and approved Manion's Management Agreement with BDA. This Management Agreement had been prepared by Nagin, and Manion served as BDA's Executive Director pursuant to this Management Agreement.

IV. BDA'S BY-LAWS REQUIRE THAT OPERATING EXPENSES BE DEDUCTED BEFORE PATRONAGE DIVIDENDS ARE PAID.

6. Article VII of BDA's By-laws provides as follows:

PATRONAGE DIVIDENDS TO BDA MEMBERS

> Section 2. There shall be distributed on a patronage basis to such members of the corporation in a manner taking into account the amount of business done by BDA with each of them, all the net savings and overcharges effected by or resulting from the operations conducted and carried on by BDA in connection with the sales of marine equipment and non-disposable marine supplies made by BDA to such Members for resale by them which remain **after paying all operating and administration expenses of BDA** and all interest on its indebtedness and after the setting aside by the Executive Director (with approval of the Board of Directors) of such reasonable reserves as he/she shall determine from time-to-time to be appropriate for the purpose of insuring the safety and welfare of BDA and for the purpose of providing for the expectancy of any losses or contingencies. . . .

(Ex. 1, By-laws, Art. VII, p. 17-18, emphasis added.)

V. MANION'S MANAGEMENT AGREEMENT REQUIRED THAT OPERATING EXPENSES BE DEDUCTED PRIOR TO THE PAYMENT OF HIS COMPENSATION.

7. Manion's BDA compensation package was set forth in Sections 6(A) and 6(B) of his Management Agreement with BDA, which in pertinent part provide as follows:

> **BDA agrees to pay MANION**, throughout the term of this Management Agreement, an *annual salary* of the greater of $110,000 per year or fifteen percent (15%) of the first $5,000,000, eight percent (8%) of the next $20,000,000, and five percent (5%) thereafter, of all Earned Incentives in excess of the sum of all Best Published Vendor Programs as calculated for each Member, **less Operating Expenses**.
>
> * * *
>
> In addition, contemporaneous with the provisions set forth in the immediately preceding paragraph, BDA shall set aside a fund, annually, and pay from that fund to the BDA Preferred shareholders, ten percent (10%) of all Earned Incentives in excess of the sum of all Best Published Vendor Programs as calculated for each Member, **less Operating Expenses**. . . .

(Ex. 1, Management Agreement, §§ 6(A), 6(B), p. 6, emphasis added.)

Section 6 is entitled, "Compensation; Expense Reimbursement:" However, Section 6(B) refers to "BDA Preferred Shareholders", speaking of shareholders in the

plural, rather than in the singular and further characterizes the 10% payment as an *"annual dividend"*. The printing of the words "annual dividend" in italics is not emphasis being added in this quotation but appears in the original of the Bylaw. Article 6(B) goes on to refer again in the next clause of the same sentence to the 10% payment as a "annual dividend" and provides that the preferred shareholder may, if he/she desires, to take in lieu of the 10% dividend a bonus so long as that shareholder is serving in a managerial or professional capacity. In view of the Conclusion of Law that Manion remains a preferred shareholder with all preferred shareholder's rights, the legal issue is raised whether paragraph 6(B) entitles Manion to a preferred dividend as described in paragraph 6(B), so long as the language thereof is not changed, even though Manion is no longer employed in a managerial or professional capacity. As stated in Conclusion of Law and Arbitration Award paragraph 5, the Management Agreement provisions relating to stock ownership are not canceled by virtue of the termination of Manion as Executive Director and his termination of employee status with BDA. Conclusion of Law and Arbitration Award paragraph 7 awards Manion preferred stock dividends to which he is entitled and which have not as yet been paid and further provides the parties to communicate and attempt to arrive at agreement as to amount and terms of payment thereof and upon failing to do so may petition the Arbitrator for determination thereof. The ongoing applicability of paragraph 6(B) to Manion as a preferred shareholder will be addressed by the parties pursuant to the meet and confer provision of paragraph 7.

8. The terms set forth in Sections 6(A) and 6(B) of the Management Agreement could not be amended or altered unless done in writing and signed by the parties. These terms were never so amended or modified, hence, the requirement

that operating expenses be taken out prior to calculation of Manion's compensation was never changed.

9. In testimony provided during the arbitration hearing, Manion admitted that his Management Agreement required that operating expenses be deducted before his compensation was paid. This circumstance was also confirmed in correspondence between Nagin and Manion. In a March 9, 1996 letter to Manion, in light of Manion's agreement to deduct operating expenses from earned incentives, Nagin demanded that he receive a larger percentage of the preferred shareholder dividend pool, which demand ultimately resulted in Nagin receiving 30% instead of 10% of the preferred dividends. (Ex. 167.) This demonstrates that Manion understood that operating expenses had to be deducted in calculating his compensation.

VI. MANION'S BAD FAITH NEGLIGENT CONDUCT.

10. Manion's Management Agreement with BDA provided that he could be terminated for "bad faith conduct which is against the interest of the corporation (malfeasance)," Manion could also be terminated for gross negligence but only if the gross negligence, "substantially impairs the continued viability of the corporation". (Ex. 1, Management Agreement, § 3, p. 3.) Manion engaged in bad faith conduct and in grossly negligent conduct. However, the evidence fails to support a finding of fact that the grossly negligent conduct, "substantially impairs the continued viability of the corporation" in that the corporation has appeared throughout this arbitration proceeding to remain viable up to a point in time which is nearly four years after the termination of Manion.

A. Manion Failed To Deduct Operating Expenses From Patronage Dividends And Never Told The Members He Was Not Deducting Them Until After the Distribution Had been Made.

In the fall of 1998, over a million dollars was distributed as patronage dividends to BDA's members. Subsequently, in an October 31, 1998 executive committee meeting, which was also attended by members of the finance committee, Manion stated that he had not been deducting operating expenses from patronage dividends "since day one." (Ex. 1, Minutes, Tab 19, p. 4). This was the first time Manion had ever informed any of BDA's members that he was not deducting operating expenses prior to distribution of patronage dividends.

12. As a result of Manion's failure to follow the By-laws and his Management Agreement, BDA had no money to pay its ongoing expenses, necessitating an emergency meeting in February 1999 to decide how to respond to this fiscal emergency. By February 1999, BDA was insolvent, with liabilities exceeding assets by thousands of dollars. This required the members to make additional emergency capital contributions to restore solvency. This created destabilization and morale problems within the membership.

13. BDA never approved or ratified Manion's failure to deduct operating expenses before distributing patronage dividends.

B. Manion Failed To Deduct Operating Expenses In Calculating His Own Compensation.

14. Manion also did not deduct operating expenses in calculating his own compensation. Instead, Manion divided the gross incentives earned by the members' purchases into

75% and 25% portions, without considering operating expenses. The 75% portion was paid to the members as patronage dividends. Manion further divided the 25% portion into 15% and 10% subportions. He kept all of the 15% portion as his compensation under § 6(A) of his Management Agreement. He also retained 70% of the 10% portion as his share of the preferred dividend under § 6(B) of his Management Agreement, while paying the remainder to Nagin.

15. The net effect of Manion's decision not to follow the terms of his Management Agreement was an overpayment of compensation and preferred dividends to Manion of over $100,000 in 1998 alone. These overpayments further contributed to the cash shortage BDA experienced at the end of 1998 and the beginning of 1999 and to the resultant destabilization and morale problems.

C. Claims Relating to the Adequacy of Manion's Providing of Financial Information to Directors and Members.

16. Conflicting claims regarding the adequacy of financial information provided by Manion to the Directors need not be resolved in this Award since the Finding of Fact that Manion engaged in "bad faith conduct which is against the interest of the corporation (malfeasance)" is sufficient to validate his termination for cause.

D. Correction of Deficiencies.

17. The contract of employment does not provide that conduct justifying termination for cause may be cured nor that advance notice and opportunity to cure be provided. However, the record supports a Finding of Fact that there was

opportunity for Manion to correct his conduct. On October 10, 1998, the members of the Finance Committee wrote a letter to BDA's Board, with a copy to Manion, identifying specific tasks for Manion to accomplish and requiring Manion to provide certain information to BDA's Secretary. As of October 31, 1998, Manion had not provided all of the requested items to BDA's Secretary and/or Finance Committee. At the October 31, 1998 meeting -- at which Manion stated he had not been deducting operating expenses prior to paying patronage dividends -- Manion was afforded another opportunity to provide financial information to the members. At that meeting, a resolution passed assigning Manion to prepare monthly financial statements and to distribute the statements to the Executive and Finance Committees. Manion failed to provide monthly financial statements during any of the subsequent months prior to his termination in February 1999.

E. Manion Withheld Financial Information In His Possession That Would Have Revealed His Bad Faith.

18. Besides not providing financial information to BDA's members, Manion withheld other financial information in his possession that would have evidenced his bad faith conduct. On September 23, 1996, Manion received a fax from Tom Rothe, BDA's Accountant, containing a balance sheet and income statement for BDA as of June 30, 1996. Manion did not provide this to BDA's members at the September 28 shareholders' meeting. If he had, the members would have discovered that BDA had a "note payable to shareholder" (Manion) in an amount exceeding $37,000. BDA's Board of Directors had never approved this note, and Manion never revealed the existence of this unauthorized note prior to his termination. Manion issued this note to himself, took out a

loan in BDA's name and, with the loan proceeds, paid himself to discharge the note.

F. Manion Is Terminated.

19. At the emergency shareholders meeting of February 13, 1999 (called because BDA needed an influx of cash to meet its obligations), a Secretary's Report was presented detailing Manion's grossly negligent and bad faith conduct. Thereafter, Manion was terminated as Executive Director by a vote of BDA's members.

20. Following his termination, Manion delivered a series of monthly financial statements to Robert Soucy and Brian Olson. Only two of these statements had previously ever been provided to BDA's members. BDA's members could have discovered the improper and unauthorized note Manion had made payable to himself had all of these statements been timely and properly disclosed.

G. Other Alleged Misconduct.

21. BDA claimed other alleged misconduct by Manion which need not be addressed in these Findings of Fact since adequate justification for BDA's action exists without such a determination.

H. Manion Owns BDA Preferred Stock.

22. Based on statutory provisions in Florida and the case law of Florida, Manion owns ninety shares of preferred stock in BDA.

The Articles of Incorporation ("Articles") for BDA were filed on June 20, 1995. Manion properly promulgated these

Articles as the initial sole director of BDA. Fla. Stat. 607.0830(1) 2001.

On May 31, 1995, twenty days prior to the Articles being filed, as general counsel for BDA, Nagin prepared a letter stating that one hundred shares of preferred stock would be issued by BDA. The letter specified that Manion would be issued ninety preferred shares and Nagin would be issued ten preferred shares. These shares were given in consideration for the financial risk, innovation, experience, and sweat equity that Manion and Nagin were contributing to BDA. The letter was signed by Manion as the subscriber and as the initial board member of BDA and also by Nagin. This letter qualifies as a stock subscription agreement. A stock subscription is a written contract to purchase newly issued stock from a corporation. Florida Statute 607.0620 provides that a subscription for shares can be made before incorporation if it is in writing and signed by the subscriber. The May 31st letter sets forth in writing the consideration for the stock, the number of preferred shares going to Manion and Nagin, and the signatures of both preferred shareholders. Regardless of whether or not Nagin performed the ministerial act of recording the transfer of preferred stocks onto BDA's books the title of the preferred stocks passed. "It is the law of this state that a transfer of stock is good between the parties and that the title passes to the purchaser without the transfer being entered into the corporate books." *In re Bush's Trust,* 81 N.W.2d 615, 622 (1957). The letter dated March 31, 1995 is a stock subscription agreement, so Manion owned preferred shares in BDA. However, even if the letter is not considered a subscription agreement, Manion is still an owner of preferred shares because of the way the Articles, By-Laws, and Management Agreement are constructed.

When Manion created the Articles of Incorporation for BDA he intended to be a preferred shareholder as reflected in the March 31, 1995 letter. "Courts must give effect to intent of parties as revealed by language of certificate of incorporation and circumstances surround its creation and adoption." *Waggoner v. Laster,* 581 A.2d 1127 (Del. 1990). As the initial board member, Manion created and filed the Articles of Incorporation ("Articles") that stated the corporation shall have the authority to issue 100 shares of preferred stock. Once the other Board members were elected to BDA they adopted the Articles and unanimously ratified the By-Laws and Management Agreement. The BDA By-Laws and Management Agreement state that the preferred shares had already been issued. Article 1 § 2(a) of the By-Laws state that "preferred shares had been issued."

Article X § 2(b) of the By-Laws state that "so long as the Executive Director and/or the General Counsel shall be a preferred shareholder, BDA shall maintain a separate policy of life insurance for each of them . . . ." Article X § 2(b) states that Manion and Nagin, as Executive Director and General Counsel, already owned preferred shares in BDA. Upon Manion's or Nagin's death or disability each or his estate was entitled to proceeds from an insurance policy taken out by BDA insuring them as preferred shareholders. The Management Agreement between Manion and BDA states on the first page that "Manion voluntarily decided to form BDA as a cooperative that shares ownership between Preferred shareholders and Members (which shall comprise its Common Shareholders), rather than as a corporation which he owns outright, so that the cooperative becomes Member-driven in its outlook and operations." Manion was not a common shareholder, so if he intended to share ownership he was obviously a preferred shareholder.

BDA claims that Manion did not own the stock because he never paid for the preferred shares. However, cash is not required for the stock of a recently formed corporation when a stockholder brings some other value to the corporation. In consideration of the preferred shares, Manion contributed tangible property such as the financial resources he put at risk, intangible property based on his concept for a cooperative of retail boat dealers, and promises to perform services in the future evidenced by written contract. Florida Statute 607.0621(2) states that the "board of directors may authorize shares to be issued for consideration consisting of any tangible or intangible property or benefit to the corporation including cash, promissory notes, services performed, promises to perform services evidenced by a written contract or other securities of the corporation."

At the time the Articles for BDA were filed Manion was the only director of the board. He authorized these preferred shares to be issued in consideration for his work and innovation which was set forth in the letter he signed on March 31, 1995.

When the new Board members were elected they could have amended the Articles, By-Laws, or Management Agreement to make it clear that Manion was not a preferred shareholder. The Board could have required Manion to complete a stock subscription agreement requiring payment by Manion for the shares by money before they adopted the Articles, but they did not. The Board members unanimously adopted the Articles, By-Laws, and Management Agreement that stated that preferred shares had already been issued. There is a presumption for the payment of shares when payment is unclear. "When it cannot be determined that outstanding shares are fully paid, and nonassessable, there shall be a conclusive presumption that such shares are fully

paid and nonassessable if the board of directors makes a good faith determination that there is no substantial evidence that the full consideration for such shares had not been paid." Fla. Stat. 607.0621(3). Manion contributed tangible and intangible property and services to BDA for consideration of those preferred shares and was therefore owner of the preferred shares.

BDA also claims that since Manion did not sign their stock subscription agreement he was ineligible for the shares of preferred stock. However, "[s]hares may but need not be represented by certificates. . . . the rights and obligations of shareholders are identical whether or not their shares are represented by certificates." Fla. Stat. 607.06.25(1) 2001. A stock subscription agreement is not required to issue shares. Furthermore, BDA's claim that Manion owes BDA $100 per share based on their stock subscription agreement is not accurate. A stock subscription agreement must be signed by the subscriber for it to be a binding agreement. Florida Statute 607.0620 (2001). Manion never signed BDA's stock subscription agreement. BDA sent this agreement to Manion after Manion was terminated from his position. Therefore, BDA's claim that Manion owed them money for the preferred shares based on an unsigned stock subscription agreement is invalid.

Lundquist v. Gulfshare Television Corp., was used in each party's argument to emphasize comparisons and contrasts to each other's case. 328 So.2d 202 (Fla. 1976). *Lundquist,* however, is important for another reason because it shows the court's ability to examine documents other than the Articles. The *Lundquist* court focused on the corporation's minutes, completed forms, and other exhibits to establish whether or not the general manager was a shareholder. *Id.* at 203.

In examining BDA's minutes and documents, there are a number of statements and documents set forth by BDA members stating that they understood Manion to be a preferred shareholder. Many of these statements and a list of these documents are listed on pages ii and 12 of "Claimant's Reply Brief on Motion for Partial Summary Disposition." The respondent does not present any minutes or documents that contest Manion's preferred shareholder status until after his termination as Executive Director. Therefore, based on the minutes and documents during Manion's tenure as BDA's Executive Director, Manion was and still is a preferred shareholder of BDA.

I. Redemption and Dividend Rights.

At the shareholders meeting February 13, 1999, where Manion was summarily terminated, a statement was written explaining that "Mr. Manion's start-up commitment with BDA had ended and that he remained a shareholder of BDA." Three days later a statement was issued that "Rick Manion's start-up commitment has ended and he remains a shareholder."

The preferred shares acquired by Manion were never repurchased and his membership as a stockholder was never cancelled. Since Manion's shares were never reacquired or cancelled he is still entitled to dividends of BDA shares, but because of the construction of the Articles and Bylaws he cannot force BDA to buy back the preferred shares. "Authority of corporation to redeem or involuntarily reacquire its stock must be set forth in the articles of incorporation." *Werber v. Imperial Golf Club, Inc.*, 413 So.2d 41 (Fla. 1982). Florida Statute § 607.0601 provides that a corporation may specify in their articles of incorporation how stocks are redeemable. Article IV, Section

4 of BDA's By-Laws provides BDA with the right to reacquire the stock if they cancel the membership of the stockholder. However, BDA never cancelled Manion's membership as a stockholder they only terminated him from his position as Executive Director and cancelled his right to buy new stock. The "[c]ourt ha[s] no power to compel . . . [a] corporation . . . to redeem its ex-employees' corporate shares, absent statute, article of incorporation, bylaw, or agreement requiring redemption . . . ." *Corlett, Killian, Hardeman, McIntosh and Levi, P.A. v. Merritt,* 478 So.2d 828, 832 (Fla. 1985). BDA never redeemed Manion's stock and nothing in its Articles or By-laws compel them to do so. Furthermore, none of the Florida statutes under Chapter 607 that deal with the redemption of stock "imposes a duty upon the corporation to redeem the shares of a terminated corporate employee." *Id.* at 829.

See paragraph 7 of these Findings of Fact regarding the language of paragraph 6(B) of the Management Agreement as regards the reference therein to payments to BDA preferred shareholders as an *"annual dividend"* and to refer also to Conclusions of Law and Interim Arbitration Award paragraph 7 instructing the parties to communicate and attempt to arrive at agreement as to amount and terms of payment of Preferred Stock Dividends and in the event of their inability to arrive at agreement for a process of presentation of remaining disputed issues to the undersigned Arbitrator for resolution.

This Interim Award instructs the parties to meet and confer concerning the questions of unpaid Executive Director salary and unpaid preferred stock dividends owing to Manion. It appears from the evidence that in the year ended June 30, 1998 Manion earned and was paid preferred stock dividends in the amount of $142,180.00. It also appears from the evidence that preferred stock dividends would not have been

earned in the year ended June 30, 1999 because of the financial condition of BDA. It further appears from the evidence that Manion's preferred stock dividends entitlement for the year ending June 30, 2000 is $3,100.00 and for the year ended June 30, 2001 it is $9,500.00. However, the parties have been given the opportunity to meet and confer to work out any details in these regards and to be heard further if they are unable to do so.

J. Preferred Stock Evaluation.

It is not necessary to determine the value of Claimant's preferred stock in view of determination that there is no mandatory right of redemption of the preferred stock under the circumstances of the termination of Manion's employment.

CONCLUSIONS OF LAW AND PROVISIONAL ARBITRATION AWARD

1. Manion's conduct, as described and detailed above, constituted "bad faith conduct which is against the interests of [BDA]", as defined by Paragraph 3 of BDA's Management Agreement with Manion, thus, legally justifying BDA's decision to terminate Manion as Executive Director.

2. BDA's viability continued at least through the hearing on this arbitration in early June of 2002, so whether or not Manion's conduct was "grossly negligent", it cannot be said it was conduct that "substantially impairs the continued viability" of BDA as defined by Paragraph 3 of BDA's Management Agreement with Manion.

3. To the extent some of Manion's conduct, as described and detailed above, was discovered after his termination, this

conduct constituted "after-acquired evidence" of Manion's misconduct, thus, legally justifying BDA's decision to terminate Manion as Executive Director. *See* Restatement (Second) of Contracts § 237, Ill. 8 (1979); *see also Von Heyne v. Tompkins*, 89 Minn. 77, 82-83, 93 N.W. 901, 903-04 (1903); *Schiavello v. Delmarva Syst. Corp.*, 61 F. Supp.2d 111, 113-14 (D. Del. 1999); *O'Day v. McDonnell Douglas Helicopter Co.*, 959 P.2d 792, 796 (Ariz. 1998); *Crawford Rehabilitation Serv. Inc. v. Weissman*, 938 P.2d 540, 549 (Colo. 1997); *Gassman v. Evanqelical Lutheran Good Samaritan Soc., Inc.*, 933 P.2d 743, 745 (Kan. 1997); *McDill v. Environamics Corp.*, 757 A.2d 162, 166 (N.H. 2000); *Lewis v. Fisher Serv. Co.*, 495 S.E.2d 440, 445 (S.C. 1998).

4. For any and all of the foregoing reasons, BDA is entitled to a ruling in its favor on Manion's claim for breach of contract of employment but not of preferred stock ownership.

5. While this Award validates the termination of Manion's employment without further obligation to pay salary and benefits after termination, it does not cancel the Management Agreement provisions regarding stock ownership and stock rights nor does it cancel other contractual provisions of the Management Agreement not related to Manion's employment as Executive Director.

6. At all times material, Manion has held and continues to hold legal beneficial and unencumbered title to 90 shares of BDA preferred stock, which stock is not subject to any claim for additional consideration owing to BDA.

7. Manion is entitled to and shall forthwith receive any preferred stock dividends to which he is entitled and which have not as yet been paid together with interest thereon at the

legal rate from the date other shareholders were paid their dividends. Counsel for the parties are instructed to communicate and attempt to arrive at agreement as to amount and terms of payment thereof and upon failing to do so may petition the Arbitrator for determination thereof by simultaneous submission of a written position paper, which written position papers are due by simultaneous submission to the Arbitrator and AAA 30 days subsequent to receipt of this Interim Award. Oral presentations will be heard as scheduled by AAA via telephone conference as soon as possible after receipt of the written position papers.

8. Manion is entitled to any unpaid salary through the date of his termination together with interest thereon at the legal rate from the date said salary payments should have been made. Counsel for the parties are instructed to communicate and attempt to arrive at agreement as to amount and terms of payment thereof and upon failing to do so may petition the Arbitrator for determination thereof. Counsel for the parties are instructed to communicate and attempt to arrive at agreement as to amount and terms of payment thereof and upon failing to do so may petition the Arbitrator for determination thereof by simultaneous submission of a written position paper, which written position papers are due by simultaneous submission to the Arbitrator and AAA 30 days subsequent to receipt of this Interim Award. Oral presentations will be heard as scheduled by AAA via telephone conference as soon as possible after receipt of the written position papers.

9. Manion's claim for conversion of his preferred stock is denied. This Arbitration has determined that Manion still owns his preferred stock and is entitled to whatever rights concerning it the law allows him. In addition, under the Florida Economic Loss Rule, BDA's conduct, short of

constituting an independent tort has no legal effect. *See AFM*, 515 So.2d at 181 (quoting *Electronic Security Systs. Corp. v Southern Bell Tel. & Tel. Co.*, 482 So.2d 518, 519 (Fla. Dist. Ct. App. 1986). *See also Reyher v Equitable Life Assurance Soc. Of United States*, 900 F.Supp. 428, (M.D. Fla. 1995). *See Anthony Distributors*, 882 F.Supp. at 1033; *Airlines Reporting Corp.*, 841 F.Supp. at 1169; *Leisure Founders*, 833 F.Supp. at 1574.

10. Manion's claim for punitive damages is denied.

11. BDA's counterclaim is denied.

12. The Management Agreement provides:

> "If any dispute arising out of this Agreement results in arbitration, litigation, or appeal, the substantially prevailing party shall be entitled to repayment of reasonable attorneys fees and costs associated with such legal actions".

The parties are entitled to be heard on any claim either may make as to which is the substantially prevailing party who is entitled to attorneys fees and costs. Respondent prevailed on the major issue of wrongful termination but Claimant prevailed on the major issue of stock ownership. Written position papers may be submitted by the parties on the issue of which party, if either of them, is entitled to attorneys fees under these circumstances. The Arbitrator does not, at this point, consider either party to be "substantially prevailing" but the parties wiil be heard on this issue as well as upon unresolved issues relating to amount and payment of dividends and unpaid salary. Written position papers are due by simultaneous submission to the Arbitrator and AAA 30 days subsequent to receipt of this Interim Award. Oral

presentations will be heard as scheduled by AAA via telephone conference as soon as possible after receipt of the written position papers.

13. All claims not specifically herein awarded or reserved for further consideration are denied.

14. Claimant has asserted claims relative to continuation of salary and for payment of the value of his preferred stock not only based upon statutory and caselaw but upon general constitutional-type principles relating to "industrial due process" or principles of equity. This Interim Arbitration Award is based upon statutory and caselaw as herein cited and not upon principles of due process or equity which are beyond the scope of this arbitration proceeding and may or may not be in litigation between the parties which is understood to be in progress in the United States District Courts.

This Award will stay in full force and effect until such time as a final award is rendered by the Arbitrator.

Dated: Nov. 12, 2002 _____

Richard L. Pemberton, Esq.
Arbitrator

MEMORANDUM

This arbitration was pursued by Claimant and his attorneys with incredible energy and determination. It was defended in similar manner and nothing included in this Arbitration Award and nothing upon which I withheld decision was in consequence of failure of counsel to do everything that could be done to advance their client's cases.

I will comment first upon what was not considered or not decided. There was objection to the Kenyon report and testimony. It was not considered. BDA made allegations concerning the way in which Manion treated or failed to treat matters for income tax purposes. No weight was given to that allegation. Income tax treatment did not form any of the basis of this Award.

The mitigation of damages issue would have been significant if there had been a determination that Manion was wrongfully discharged and entitled to breach of contract damages for lost employment compensation. The same is true of the issue of valuation of Manion's preferred stock, were there to have been a determination that he was entitled to have the stock redeemed and that BDA had an obligation to redeem it. Because I did not find any such right or any such obligation, that vexatious issue was also not decided, whether, Manion, under some concept of due process and equity is legally entitled to have a redemption of his stock is beyond the purview of this arbitration.

I gave the most serious consideration to whether or not there could be any justification of Manion's failure to recognize the necessity of dealing with expenses in computing patrons' net dividends and in computing his own salary. I wanted to give him every consideration in this regard, because the stakes are high. I have spent my entire professional life dealing with cooperative associations in one context or another. Cooperatives proliferate throughout the agricultural Midwest. There are electric cooperatives, telephone cooperatives, grain cooperatives, dairy cooperatives, buyers cooperatives, and sellers cooperatives of every size and shape. I believe it to be a universal principle understood by everyone who is a member of a cooperative association or an employee of a cooperative association or a

director of a cooperative association that the expenses of doing business must be considered before computation of net dividends.

When a managerial salary is keyed to dividends, it is equally clear that expenses of doing business have to be considered in the computation of that salary. I cannot conceive of Mr. Manion not realizing this elemental truth.

It was argued that Manion was in a Catch 22 situation and that he could have been discharged for failing to send out patron's net dividends without the deduction of expenses because that is what the Directors had told him to do. I believe that if he had refused to send out the dividends and been discharged for failing to do so in the face of his protest that the Directors had to figure out how to allocate expenses before the dividends could be computed, he would have had a wrongful discharge claim of merit. But, I cannot conceive of how Manion thought BDA could continue in business without accounting for the expenses of doing business.

While the wrongful distribution in question was cured by a capital call and perhaps could have been cured by borrowing as well, thus not in fact substantially impairing the continued viability of the corporation, (as time has shown that it did not) the conduct cannot be characterized as other than grossly negligent and against the interest of the corporation. I cannot escape the conclusion that it is justification for involuntary termination.

I very seriously considered whether or not the conduct of BDA Officers and Directors could be considered because, if they knew or should have known that they were receiving dividends without deduction of expenses, I am hard put to excuse their conduct in accepting those distributions. If they

were without the financial information which they claimed not to have for as long a period of time as they said they did not have it, it is hard to excuse their failure to have acted sooner than they did to demand such information. However, the law is clear to me that BDA's failures, no matter how hard to excuse, do not work to change the fact or legal effect of Manion's conduct (see Conclusion of Law paragraph 9). Perhaps, if third parties had been harmed, they would have a meritorious claim against Officers and Directors as well as against Manion, but that was not the issue in this arbitration.

RLP

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 03-2869, No. 03-2870

[Filed January 24, 2005]

Patrick T. Manion, Jr., et al., Appellants,	)
v.	)
Boat Dealers' Alliance, Inc., et al., Appellees.	)

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Colloton took no part in the consideration or decision of this matter.

Order Entered at the Direction of the Court
Clerk, U.S. Court of Appeals, Eight Circuit

APPENDIX H

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S.C.A. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 9 U.S.C. § 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the

said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

Title 9 U.S.C. § 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

[(5) Redesignated (b)]

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the

use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

Title 9 U.S.C. § 16. Appeals

(a) An appeal may be taken from--

(1) an order--

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order--

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

APPENDIX I

PROCEEDINGS BEFORE THE AMERICAN ARBITRATION ASSOCIATION

RE: 65 160 00018 00

Patrick T. Manion, Jr.	)
Claimant,	)
v.	)
	)
Boat Dealers' Alliance, Inc.	)
Respondent.	)
	)

TELEPHONIC HEARING
JANUARY 7, 2003

On January 7, 2003, at 10:06 a.m., the following proceedings in the above-styled and numbered case were heard before the American Arbitration Association, as reported by Dawn E. Workman, CSR in and for the state of Texas, reported by machine shorthand, at the offices of Dickman Davenport, Inc., 3838 Oak Lawn Avenue, Suite 1010, in the city of Dallas, County of Dallas, State of Texas.

APPEARANCES

THE ARBITRATOR VIA TELEPHONE:

Mr. Richard L. Pemberton
Pemberton Sorlie, Rufer & Kershner, P.L.L.P.
Law Office Building
110 North Mill Street
P.O. Box 866
Fergus Falls, Minnesota 56538-0866

APPEARING FOR THE CLAIMANT:

Mr. William J. French
CONANT FRENCH & CHANEY, L.L.P.
1717 Main Street, Suite 3880
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Mr. Martin A. Carlson (Via Telephone)
Lockridge Gri ndal Nauen, P.L.L.P.
100 Washington Avenue South
Suite 2200
Minneapolis, Minnesota 55401

APPEARING FOR THE RESPONDENT VIA TELEPHONE:

Mr. Richard J. Nygaard
RIDER, BENNETT, EGAN & ARUNDEL
333 South Seventh Street
Suite 2000
Minneapolis, Minnesota 55402

FOR THE AMERICAN ARBITRATION ASSOCIATION
VIA TELEPHONE:

Ms. Sherri R. Griffith
AMERICAN ARBITRATION ASSOCIATION
13455 Noel Road, Suite 1750
Dallas, Texas 75240

PROCEEDINGS

[p.3]

THE REPORTER: Mr. Pemberton. Hello?

THE ARBITRATOR: Yes.

THE REPORTER: This is the court reporter. Nobody told me we were on the record yet, so, I'm sorry, I don't have anything you just said.

THE ARBITRATOR: Very well. Mr. French has engaged the court reporter, and he is going to be determining what you do or do not do. That is beyond my control or I think beyond the control of anyone else in [p.4] this matter. I don't intend to repeat what I said for the record.

MR. FRENCH : Mr. Pemberton, this is Mr. French. I would ask that you repeat what you just said for the record because I think it is material to the proceedings and to the court's understanding of the proceedings that we are engaged in today.

THE ARBITRATOR: You should have asked the court reporter to begin writing when I began talking. You may repeat to the court reporter what you understand I've said.

MR. FRENCH : My understanding, sir, is that you have not received any of the objections that the claimant has filed with the AAA to your jurisdiction or authority to proceed in this matter; is that correct?

[p.4]

THE ARBITRATOR: That is correct.

MR. FRENCH : Okay. My understanding, also, is that notwithstanding your nonreceipt of that information, you proposed to go ahead and decide certain issues that were left open in the award -- purported award that was previously issued; is that correct?

THE ARBITRATOR: No. What I said is that the purpose of this telephone conversation is to decide whether I go forward without receiving any submission from the claimant in response to the invitation which I made in the interim award, since the claimant has not chosen to submit anything to me directly, as has been the method of operations of this arbitration throughout its life where the parties have submitted directly to me, whether I go ahead and decide on what has been submitted to me, which is only from the respondent, or whether the claimant wishes to ask permission to submit something to me.

MR. FRENCH: Are you aware, Mr. Pemberton, that the claimant and the respondent were both directed 30 days before the award or approximately 30 days before the award was issued not to have any further direct communication with you, sir?

THE ARBITRATOR: I don't have a specific recollection of that. I -- I am not saying that there's [p.5] not somewhere

in my files a copy of a communication that the AAA may have made to the parties so instructing, but I'm not aware of it as we speak.

MR. FRENCH: Okay. One final question, if I might, sir. There is apparently some dispute and disagreement between the parties as to what rules we are proceeding under. I myself am confused. I do not know, for instance, whether we are proceeding under the employment rules or the commercial rules.

MS. GRIFFITH: That would be the employment rules.

MR. FRENCH: I didn't ask you. I would like to know what the arbitrator is using as the rules in this proceeding.

THE ARBITRATOR: Yeah, I would have to check on that. I believe that in the materials that have been generated in this proceeding, that that is rendered clear, but I would have to check on that before I would respond to that.

MR. FRENCH: Well, the --

MR. NYGAARD: Excuse me. This is Dick Nygaard. May I make a response to this colloquy?

MR. FRENCH: I would like --

THE ARBITRATOR: Yes, go ahead.

MR. NYGAARD: The arbitrator -- the [p.6] agreement -- the written agreement by which this case is being arbitrated provides under Paragraph c, page 8 of 10 of the Arbitration Agreement -- it says: Pursuant to the then commercial arbitration rules of the American Arbitration Association, but

subject to the understanding that each -- well -- that each of the parties may take some depositions. But it says: The then current commercial arbitration rules of the American Arbitration Association. That's what the agreement says.

MR. FRENCH: Do I understand correctly that those are the rules, then, under which this arbitration is proceeding?

MR. NYGAARD: To whom are you addressing that question?

MR. FRENCH: I am addressing it to Mr. Pemberton.

MR. NYGAARD: Okay. Because my answer to that is I assumed all along we were under the then -- the commercial arbitration rules of the American Arbitration Association, is my answer to that question.

THE ARBITRATOR: Well, I think that the agreement to arbitrate speaks for itself in that regard. I don't recall any question being raised up to this moment as to what rules we were proceeding under or [p.7] whether there is any difference in the provisions of the two rules. I don't recall any objection being made on a procedural ground or any procedural issue being raised. And if there is such an issue that bears upon the question of how we proceed from this point on, I'd be happy to hear counsel for the parties speak on that issue.

MR. FRENCH: Actually, what I would like to know is under what rules was -- were the -- was the award issued? What rules governed the issue of the award?

THE ARBITRATOR: It appears to me that the commercial rules that are specified in the agreement to arbitrate are the applicable rules.

MR. FRENCH: And that is -- those are the rules under which the award, then, was issued?

THE ARBITRATOR: I don't recall any issue being raised as to the applicable rules. I don't recall the parties raising a question about the rules during the course of the proceeding or in their posthearing briefs. And the award was issued without reference to one set of rules or the other because there was no issue pending called to the arbitrator's attention as to which rules were involved or as to any difference between the
rules.

[p.8]

MR. FRENCH: Well, there obviously is a material difference, and that's why I would like to know definitively what rules were -- governed the issuance of this award.

MR. NYGAARD: This is Dick Nygaard speaking again. I don't believe -- I disagree with counsel. I don't believe there is a difference in the rules, and I very strongly object to at this point in the proceeding, as the interim award has been made in this case, the arbitrator has invited for counsel's benefit, for counsel's client's benefit, additional submissions, which he has refused to do. And now to take this approach that there is somehow a challenge to the award to the proceeding, which was set up at his request the whole time, and I very strongly object to it. And as far as I'm concerned, there's difference between the rules, and the arbitrator has

acted within its authority of the arbitration agreement at all times and is continuing to do so.

MR. FRENCH: Well, do I understand correctly that the interim award was issued pursuant to the arbitrator's authority unilaterally to engage in that kind of an award?

MR. NYGAARD: Well, if you want me to [p.9] respond to what you just said, I don't understand your question with regard to unilaterally.

MR. FRENCH: I'm not talking to you.

MR. NYGAARD: The arbitrator responded -- the arbitrator, as far as I'm concerned, exercised the powers that he is given under the arbitration agreement.

MR. FRENCH: Mr. Pemberton, I would like an answer to the question as to whether or not the award was issued on your own authority.

MS. GRIFFITH : Okay. Mr. French, if you will refer to commercial rule 45, the arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including but not limited to specific performance of a contract.

MR. FRENCH: Thank you. Now --

MR. NYGAARD: And I'd also refer counsel to R 36 and R 38, which also give him the power to do that.

MR. FRENCH: Do I understand correctly, Mr. Pemberton, that those are the rules under which the award was issued?

THE ARBITRATOR: I think that this discussion is becoming redundant and repetitive, and I'm not going to hear anything further on this. If there's [p.10] something else that either counsel wishes to raise, they may do so.

MR. FRENCH : Yes, there is one other point I'd like to raise. At the beginning of this matter, the AAA gave the parties the opportunity to opt into the employment rules, specifically Mr. Galante's letter of February 4, 2000 to the parties. The parties were given the choice of the commercial rules or the employment rules under that letter. They had to make that choice on or before February 17, 2000, and they had to make it by writing to object to the employment rules.

No party objected to the application of the employment rules, and you, sir, were picked under the employment rules. I have a number of letters that confirm that. So Mr. Nygaard is dead wrong when he says the commercial rules apply, and Ms. Griffith is dead wrong when she cites the commercial rules, only the --

MS. GRIFFITH : Okay. Mr. French, there is Rule 27 in the employment rules that states the same thing under interim measures, at the request of any party the arb --

MR. FRENCH: No party has made a request, Ms. Griffith, for interim measures, specifically interim measures allowing the arbitrator to direct the parties [p.11] to settle the case, allowing the arbitrator to direct the parties to file new petitions, or anything else that the arbitrator did.

MS. GRIFFITH : Okay.

MR. FRENCH: This award is defective.

MS. GRIFFITH: We can talk about this after the conference, if you could contact me. We'll go forward with the conference now, Mr. Pemberton.

MR. FRENCH: I am still --

THE ARBITRATOR: Very well. I am happy to hear anything more that either counsel wishes to say on this matter that's not redundant, but what the -- what I am seeking to hear from counsel is whether or not claimant wishes to submit to me anything further before I proceed to the issuance of a final award.

MR. FRENCH: I am still under an order from the AAA not to submit anything to you, sir.

THE ARBITRATOR: I'm not aware of that order.

MR. FRENCH: I am.

MS. GRIFFITH: Okay. Mr. French, we never issued such an order.

MR. FRENCH: You in your letter, Ms. Griffith, directed the parties not to have any [p.12] further direct conversation or communication with the arbitrator. Do you deny that?

MR. NYGAARD: Counsel, this is Dick Nygaard. I know the provision of the letter that you're talking about, but I assume that it does not apply to those communications that the arbitrator has specifically requested and given us the opportunity to do, which is what you had.

MR. FRENCH: This is not --

MR. NYGAARD: Before we leave this record, which I think we' re about ready to do, I want to state that I feel very strongly, Mr. French, that you and your client have been in bad faith throughout the entire proceeding of this matter that has been unduly extended from the deposition phrase all the way through the trial phase of this case, that you, yourself, asked for many extensions for various personal reasons, all of which were granted by the arbitrator.

And now at the 11th hour when you've lost this case to come and raise -- attempt to raise these technical and procedural objections, which are in bad faith, and I request the arbitrator here and request on the record and request the American Arbitration Association that we be issued all of the -- an award for all of our administrative fees and attorneys fees, in [p.13] addition to the provisions of the contract, for your bad faith in handling this.

I want to also state on the record that you have sued two federal court actions, one against the same client and one against the individual members of my client, some of which I represent, we are incurring attorney's fees to defend the federal court action, which you asked to proceed, and you've amended your complaint to include specific allegations, which have already been ruled against you by the arbitrator, and that that is in bad faith, and I strongly object to all of your delay tactics here.

MR. FRENCH : Ms. Griffith's letter of November 12, 2002 states, and I quote: This serves as a reminder, there is to be no direct communication with the arbitrator, Richard L. Pemberton. All communications shall be directed to the Association.

As I said before, I am still under that direction.

MS. GRIFFITH: Okay. The Association has not received the items that were supposed to be submitted in the -- as to the interim award from you.

MR. FRENCH: Because that was supposed to go to the arbitrator, and I was directed not to speak to the arbitrator, not to communicate with him. Plus, [p.14] there was a prior issue of jurisdiction and authority of the arbitrator to continue in this matter. That issue has not been resolved by the AAA.

THE ARBITRATOR: All right. Let's deal with this direct communication issue. Throughout the lengthy life of this arbitration, we have followed the practice of the parties submitting directly to me substantive matters, such as motions and responses thereto, briefs, et cetera, and the materials that I have requested to be submitted directly to me.

And if Mr. French feels that he's been unable to submit his position as invited by the interim award, I think that he can understand from this conversation, unless Ms. Griffith disagrees with me, that he may, if he issues, submit the submission that he feels he's been blocked from submitting thus far, and that should end that.

Are you and I in agreement on that, Ms. Griffith?

MS. GRIFFITH: Yes, we are.

THE ARBITRATOR: Thanks, and with, of course, a copy to AAA --

MS. GRIFFITH: Right.

THE ARBITRATOR: -- and to opposing counsel.

[p.15]

MR. FRENCH : Of course.

THE ARBITRATOR: So if you wish to do that, Mr. French, we should consider the time within which you will do it.

MR. FRENCH: Yes, I can have it to you in 30 days.

MR. NYGAARD: I object to that.

THE ARBITRATOR: State your basis, Mr. Nygaard.

MR. NYGAARD: I object to that strongly. He has had the opportunity. If he -- I object to giving him any additional time, number one, because if he did feel that he couldn't submit it directly to the arbitrator, he could have submitted it to the American Arbitration Association to forward to the arbitrator, and you gave them a specific time period to do that. In fact, you required there to be an exchange. In fact, you required there to be attempted agreement by the parties before that.

He has chosen not to do that, so even if he felt he couldn't submit it to the arbitrator, he could have submitted it to the American Arbitration Association for forwarding to you. Certainly, anything you -- and, in fact, that's what he did do, he submitted a brief or he asked for affirmative relief to the [p.16] American Arbitration Association and made no response to the -- to the items that you left open. I strongly disagree with giving him any further time to submit anything else at this time. If he wants to submit something on a substantive basis, give him a couple of days to do it. He's had all of these -- all of this time to prepare whatever he wants.

And, in fact, throughout this whole case, he's asked for additional time on all of the deadlines you've stated, and you've granted all of them. I'm now sitting here defending a federal court case, which ought to be dismissed. As soon as I get a final award in this case, and my clients are spending attorney's fees to defend that matter, and we have to proceed with discover. So we are strongly prejudiced by any grant of additional time.

MR. FRENCH : That' s not true. Most of the delay in this case has been the direct response of BDA firing their counsel interminably, over and over and over again. That's the reason this case was not tried over a year and a half ago.

THE ARBITRATOR: I' m going to allow Mr. French two weeks from today within which to submit anything further he wishes to submit.

MR. FRENCH: One question, if I might.

[p.17]

We still have objections to your continuing jurisdiction and authority to decide anything, sir. May I submit them without waiving those objections?

THE ARBITRATOR: I'm not going to be dealing with objections to my continuing participation. That will have to be handled between the claimant and AAA, I believe.

MS. GRIFFITH: Right, and we are reviewing this file. We will have a decision to you, and that decision will be final.

MR. FRENCH: Well, until a Court looks at it, perhaps.

MR. NYGAARD: I object to your threat, counsel.

MR. FRENCH : It' s not a threat.

THE ARBITRATOR: Is there anything more that we can accomplish in a positive vein in this conversation, because, if there is, I'd like to accomplish it? Mr. French, do you see anything further that we can accomplish?

MR. FRENCH: No.

THE ARBITRATOR: Mr. Nygaard?

MR. NYGAARD: I do not.

[p.18]

THE ARBITRATOR: All right. Thank you for your participation, and I will get out a -- a further letter order specifying the time limit, two weeks from today, this being the 7th, would be the 21st. That would be the date upon which I would expect the materials sent to me to be either postmarked or -- or -- or delivered.

MS. GRIFFITH: Okay. Do you want those sent directly to you, Mr. Pemberton, with a copy to the AAA and opposing counsel?

THE ARBITRATOR: I should think so.

MS. GRIFFITH : Okay.

THE ARBITRATOR: All right. Hearing nothing further from anyone, I'll wish you all a good morning.

MR. NYGAARD: Thank you, sir.

MS. GRIFFITH: Thank you.

MR. CARLSON: Good morning.

(Proceedings adjourned at 10:24 a.m..)

[p.19]

STATE OF TEXAS)

COUNTY OF DALLAS)

I, Dawn E. Workman, certified shorthand Reporter, in and for the state of Texas, certify that the foregoing transcript of proceedings was reported stenographically by me at the time and place indicated, to the best of my ability, said witness having been placed under oath, and that the transcript of proceedings is a true record of the proceedings.

I further certify that I am neither counsel for nor related to any party in this cause and am not financially interested in its outcome. Given under my hand on this the _____ day of _____, 2003.

_____

Dawn E. Workman, Certified
Shorthand Reporter No. 6129
in and for the state of Texas
Dickman Davenport, Inc.
3000 Carlisle, Suite 113
Dallas, Texas 75204
(214) 855-5100 (800) 445-9548
e-mail : dd@intex.net
My commission expires 12-31-03

APPENDIX J

CONFIDENTIAL LONG-TERM MANAGEMENT AGREEMENT

* * *

BETWEEN: **PATRICK T. MANION, JR.**, who resides at 3983 Pine Point Road, St. Cloud, Minnesota 56303 (referred-to in this Agreement as "MANION"),

AND: **BOAT DEALERS' ALLIANCE,** a buying/merchandising cooperative to be formed as a Florida corporation, having its place of business at 3983 Pine Point Road, St. Cloud Minnesota 56303 (referred to in this Agreement as "BDA").

WHEREAS, BDA was created and organized by MANION for the purpose of forming and operating a buying/merchandising cooperative to be composed of individual, independent retail marine dealers with common interests and desires to achieve efficiencies in promotions and purchases of marine equipment and non-disposable marine supplies, as well as to receive the benefit of joint promotions and more favorable purchasing arrangements than the individual dealers generally receive from manufacturers of; and

WHEREAS, MANION has over twenty years experience working for boat manufacturers and desires to create and organize BDA for the purpose set forth above; and

WHEREAS, it is the desire and intent of BDA to hire and employ MANION to provide the specified services attendant to and necessary in the formation, planning, operation and conduct of the day-to-day business of BDA, which is set forth in this Management Agreement; and

WHEREAS, it is MANION's desire to be hired and employed by BDA to provide the specified services attendant to and necessary in the planning, operation and conduct of the day-to-day business of BDA as set forth in this Management Agreement; and

WHEREAS, MANION voluntarily decided to form BDA as a cooperative that shares ownership between Preferred shareholders and Members (which shall comprise its Common Shareholders), rather than as a corporation which he owns outright, so that the cooperative becomes Member-driven in its outlook and operations;

WHEREAS, the BDA Board of Directors, as well as all Charter Members in attendance at its meeting on March 3, 1996, have fully reviewed, approved, and authorized the execution of this contract.

NOW THEREFORE, in consideration of the promises and mutual covenants set forth in this Management Agreement' and other good and valuable consideration, the receipt and sufficiency of which hereby are acknowledged, the parties to this contract hereby covenant and agree, as follows:

1. **SUPERSEDING EFFECT:**

This Management Agreement shall supersede all prior oral or written agreements, if any, between the parties and constitutes the entire agreement between MANION and BDA concerning the subject matter set forth in this contract.

2. **DEFINITIONS:**

As used in this contract, the following terms and conditions shall be defined as follows:

A. By-Laws: The BDA By-Laws

B. Member(s): The affiliated dealers in BDA.

C. Management Agreement: This contract and any and all amendments and modifications executed and delivered to the parties to this Management Agreement in the manner specified, below.

D. Marine Equipment: Those items of Marine Equipment commonly as understood and used in the retail marine industry, including but not limited to boats, trailers and parts, outboard motors and stern drives, jet skis and personal watercraft, and the like.

E. Non-Disposable Marine Supplies: Those items of Non-Disposable Marine Supplies as commonly understood and used in the retail marine industry, including but not limited to boat accessories (including but not limited to charts, compasses, coverings [boat tops, cushions, carpets, enclosures, and sun shades], diving equipment, fishing tackle, life-preservers, lines

and rope, marine electronics, marine hardware and paint, water skis, wind suffers, etc.) and similar items.

F. Confidential Information: Information relating to the membership merchandising programs, purchasing programs, discount percentages, advance flyers, operational procedures and controls, computer database(s), correspondence, electronic mail, reports, internal documents, price lists, non-public information about vendors, non-public contracts, this Management Agreement, and other secret information relating to BDA, including the By-Laws.

G. Earned Incentives: All gross discounts in excess of benchmarked "best published vendor program" less "Operating Expenses" before distributions and before income taxes, if any (regardless of form or method of payment). Such gross discounts shall include but not are limited to volume incentives, promotional allowances, rebates and other benefits of every kind or type paid or credited by manufacturers or any other source(s) to or through BDA as calculated in accordance with contracts between BDA and its affiliated Vendors.

H. Best Published Vendor Program: A benchmarked percent, determined for each Vendor by the Executive Director and the Executive Committee, based on each Vendor's model year published prices (including standard advertising or co-op advertising allowances) that legally are available to any individual boat dealer that purchased and paid for the volume of that Vendor's products required to obtain such published prices, as of the Vendor's preceding model year.

I. Operating Expenses: All approved costs of operations, including depreciation of capitalized items but not including extraordinary or capitalized expenditures, taxes, or merchandising expenses.

J. Applicable Percentage: The percentage of Earned Incentives which shall be used to compute the dividends to be paid to BDA Preferred shareholders.

3. **EMPLOYMENT OF MANION:**

BDA agrees to employ MANION pursuant to this Management Agreement to perform the services specified below, and MANION accepts such employment in accordance with stated terms and conditions and for the duration of this Management Agreement, unless previously terminated by MANION's death, resignation, or a disability of sufficient magnitude to preclude him from substantially fulfilling his responsibilities under this Management Agreement, termination for proven felonious conduct, bad faith conduct which is against the interests of the corporation (malfeasance), or grossly negligent conduct that substantially impairs the continued viability of the corporation.

4. MANION'S DUTIES AND RESPONSIBILITIES:

A. MANION shall, during the term of this Management Agreement, provide the services specified below in connection with the day-to-day affairs of BDA, subject, however, to the authority of the BDA Board of Directors or, where applicable, the Executive Committee of the Board of Directors, as set forth in the BDA By-Laws. MANION's duties shall consist of the following:

1. Complete charge of the conduct and operation of the corporation's day-to-day affairs, including but not limited to carrying out the policies of the Board of Directors or the shareholders; providing day-to-day management; representing BDA at industry functions; hiring appropriate and necessary staff and outfitting the corporation's offices with appropriate equipment and supplies; preparing billings, maintaining records of payments to the organization, and overseeing deposits of funds paid to the organization into accounts maintained by BDA; overseeing preparation of checks and handling necessary disbursements; implementing procedures for ordering and for verifying orders for marine equipment and non-disposable marine supplies; providing the corporation's General Counsel with such information necessary to render legal opinions, assure the corporation is duly authorized to transact business; and to provide such legal services as may be required; preparing annual budgets and providing the corporation's Certified Public Accountants with such reports and information as may be necessary to facilitate preparation of audited financial statements and tax returns;

2. Overall responsibility for creation and maintenance of the premier buying group in the retail marine industry, including but not limited to identifying potential opportunities that would enable Members to purchase more efficiently, using his best efforts to procure Vendors and negotiate purchasing contracts, spot-buys, or most favored dealer incentives with those Vendors; and

assuring that appropriate measures are taken to ensure that Confidential Information is strictly maintained at all times and is not divulged to third parties.

3. Overall responsibility for selecting meeting sites and negotiating with hotels in connection with BDA meetings, and coordinating the meetings, shows, conventions, or other joint activities of the organization;

4. Overall responsibility for membership matters including but not limited to implementing and administering any assessments authorized by the Board of Directors or the Executive Committee; collecting dues and assessments; encouraging maximization of purchasing programs; and handling applications for BDA membership;

5. Overall responsibility for maximizing opportunities for joint merchandising programs, including but not limited to overseeing creation and printing of sales flyers, point-of-purchase materials and the like;

6. Overall responsibility for providing billing and general administrative services for the organization including but not limited to making such periodic or special reports to the Board of Directors relating to matters of concern or general interest with respect to BDA, as requested by the Board of Directors or the Executive Committee; and

7. Overall responsibility for utilizing corporate resources in an effective and efficient manner taking into account the character :and functions of the organization and considering the best interests of the Members.

B. Manion undertakes to perform only those duties that specifically as set forth in this Management Agreement as well as such activities naturally arising from the duties specifically set forth in this Management Agreement. Without limiting the generality of the foregoing, it specifically is agreed that MANION shall not be expected to perform for BDA any of the following duties:

1. Any duties that require the services of a licensed attorney-at-law;

2. Any duties that are the responsibility of the corporation's Certified Public Accountants;

3. Any duties for which third parties will be contracted to perform, such as printing, arranging travel, etc.;

4. Any duties relative to exercising ultimate responsibility which rests with the Board of Directors, the Executive Committee, or the shareholders, pursuant to the BDA By-Laws; and

5. Except to the extent required by law or expressly required by this Management Agreement, any duties whatsoever in respect to his Executive Director functions at any time following the expiration or termination of this Agreement.

C. Except as otherwise provided in this Management Agreement, MANION shall be entitled to use and rely on his best judgment in dealing with the foregoing matters, subject, however, to any specific advice or direction received from the Board of Directors in particular instances, pursuant to its prerogatives as set forth in the BDA By-Laws.

5. APPOINTMENT OF PROFESSIONALS:

MANION promptly shall appoint from time to time as may be necessary:

1. An independent Certified Public Accountant or accounting firm to provide accounting and auditing services to BDA; and

2. An attorney or firm of attorneys to serve as Generai Counsel, to represent BDA in respect to corporate matters, claims, suits, and all manner of legal services. General Counsel shall attend all Board of Directors meetings and shareholders meetings, and shall prepare minutes for review by the Executive Director and the Secretary of the corporation.

MANION retains the right to discharge any professionals so appointed upon employing substitute professionals to provide services to BDA. MANION promptly shall notify the BDA Board of Directors of all professionals so appointed or discharged.

6. COMPENSATION; EXPENSE REIMBURSEMENT:

A. BDA agrees to pay MANION, throughout the term of this Management Agreement, an *annual salary* of the greater of $110,000 per year or fifteen percent (15%) of the first $5,000,000, twelve and a half percent (12½%) of the next $10,000,000, ten percent of the next $15,000,000,eight percent (8%) of the next $20,000,000, and five percent (5%) thereafter, of all Earned Incentives in excess of the sum of all Best Published Vendor Programs as calculated for each Member, less Operating Expenses. Such Earned Incentives shall be paid in equal monthly installments. In the event that fifteen percent of all Earned Incentives is greater than the base rate of $110,000, any remainder due to MANION shall be paid at the same time and in the same manner as patronage dividends are paid to Members, or within eight and a half (8½%) months of any year, whichever is sooner. During the first two years of this long-term Management Agreement, in the event there is insufficient revenue to pay MANION's annual salary, whatever portion or percentage that is unpaid shall be accrued and paid during the third (and, only if necessary fourth) year(s) of this Management Agreement.

B. In addition, contemporaneous with the provisions set forth in the immediately preceding paragraph, BDA shall set aside a fund, annually, and pay from that fund to the BDA Preferred shareholders, ten percent (10%) of all Earned Incentives in excess of the sum of all Best Published Vendor Programs as calculated for each Member, less Operating Expenses, but including earned interest (if any) on funds set aside pursuant to

this paragraph, or in lieu of such *annual dividend,* may substitute and pay as a *bonus* in lieu of said annual dividend, at the election of all Preferred Shareholders who serve in a managerial or professional capacity, the Applicable Percentage in accord with each Preferred shareholder's respective number of shares.

C. MANION shall receive the right to participate in all benefits generally provided from time-to-time to BDA employees, such as group life, health, and disability insurance.

D. MANION shall be entitled to take up to three weeks paid vacation each year for the first five years, and four weeks per year thereafter. Unused vacation time neither shall be carried over in any other year nor shall any salary or other payment be taken in lieu of vacation(s).

E. BDA agrees to reimburse MANION for all *reasonable and necessary expenses* incurred on behalf of BDA in his capacity as Executive Director, including but not limited to airfare (at the unrestricted coach class rate), and membership in not more than two airline clubs; automobile rental, insurance, and fuel (or prevailing mileage established by the American Automobile Association or its equivalent, if a personal vehicle is used) when associated with travel for BDA; reasonable lodging and food expenses associated with BDA travel; telephone or comparable communications expenses incurred through or on behalf of BDA; subscriptions to industry publications, and access to other publications or research through the Internet; a portable computer and printer equipped for

communications, along with appropriate software; a portable telephone or other communications device; and an expense account to be approved by the Board of Directors.

7. DURATION OF THIS AGREEMENT; PROCEDURE FOR TERMINATION; NON-COMPETITION AFTER TERM:

A. This Agreement shall be in full force and effect for an initial period of not less than twenty (20) years from the "anniversary date" of:

July 1, 1995

B. After the initial twenty year period, this Agreement shall be extended and continue in effect from year-to year, unless either BDA or MANION, without cause, elects to terminate upon the anniversary date in any subsequent year. Termination without cause only shall be effective, if, not less than sixty days prior to the anniversary date, written notice is provided as set forth in *Section 13* of this Agreement. Either party may, after the initial twenty year period, terminate the Agreement for valid cause, on 60 days' notice.

C. After the term of this Management Agreement, MANION agrees that for a period of eighteen (18) months from the date of his separation from employment he will not accept employment from or otherwise act as an employee, agent or consultant for any trade organization that engages directly (or indirectly through its members or affiliates) in the purchase, sale, distribution, or promotion (or provision of services related to these functions) of

marine equipment and/or non-disposable marine supplies, without the express written approval of the BDA Board of Directors.

8. ASSURANCE OF CONFIDENTIALITY:

MANION agrees to hold in strictest confidence all of BDA's Confidential Information and upon termination of his employment to return and relinquish to BDA all originals and copies (in any tangible means of expression) of such Confidential Information.

9. INJUNCTIVE RELIEF; APPLICABLE LAW; ARBITRATION; VENUE; ATTORNEYS FEES:

A. Both parties acknowledge that a lawsuit merely for damages that occur, or are likely to occur, as a consequence of a breach of any of the provisions of this Agreement will be inadequate, and that either party is entitled to injunctive relief in case of any breach, as well as all other relief available via law or equity.

B. This Agreement shall be construed and interpreted in accordance with the laws of the State of Florida.

C. In the event that any dispute arises with respect to the interpretation, execution, or enforcement of this Agreement the same shall be submitted to binding arbitration either in St. Cloud, Minnesota, or Miami, Florida (whichever location is preferable to the party which files first), pursuant to the then current commercial arbitration rules of the American Arbitration Association, but subject to the understanding that each party may take up to three

depositions, and that the arbitrator(s) shall issue complete findings of fact in addition to an award. The power conferred by this paragraph is without prejudice to the right of a party under applicable law to request interim relief directly from any court, tribunal, or other governmental authority of competent jurisdiction, and to do so without prior authorization of the arbitrator(s). Such a request for interim relief neither shall be deemed incompatible with, nor a waiver of, the requirement of arbitration of disputes.

D. If any dispute arising out of this Agreement results in arbitration, litigation, or appeal, the substantially prevailing party shall be entitled to repayment of reasonable attorneys' fees and costs associated with such legal actions.

10. ENTIRE AGREEMENT; SEVERABILITY CLAUSE; SUB-TITLES; WAIVERS:

A. This Agreement (including attached Exhibits) contains the entire understanding and agreement of the parties. Any amendment, alteration, modification, or revocation shall be in writing and signed by the parties.

B. If any part of this Agreement is held to be invalid or unenforceable, such holding will not affect any other part of the Agreement that can be given binding effect. If, moreover, any part of this Agreement is for any reason held to be excessively broad as to time, duration, geographical scope, activity or subject, it will be construed, by limiting or reducing it, or by adding a provision as similar to such unenforceable provision as may be

possible so as to be legal, valid, and enforceable to the maximum extent necessary for the protection of both parties.

C. All sub-titles in this Agreement are included solely for ease of reference and shall not control or limit the substance of any portion of this Agreement.

D. All waivers of any right(s) provided by this Agreement or by law, or of any breach or default by a Party shall be in writing. The failure to demand specific performance shall not constitute a waiver of any provision of this Agreement, or a waiver of any other default. The waiver by either party of a specific breach of, or default under, this Agreement by the other shall not be deemed a waiver of any subsequent breach or default.

11. ACTS REQUIRED TO EFFECTUATE THIS AGREEMENT:

Both parties agree to execute any document(s), resolution(s), or other instrument(s) which may be required of either of them or which may be necessary for the purpose of fulfilling, effectuating, or implementing the provisions of this Agreement.

12. CONSTRUCTION OF THIS AGREEMENT:

This Management Agreement has been prepared by MANION and was thoroughly reviewed bythe initial Board of Directors who ratified it. The parties agree that this document (including exhibits) is a product of all of their efforts, that it expresses their mutual understandings, and that it should not be interpreted in

favor of either party or against either of them merely because of MANION's efforts in preparing it.

13. NOTICES; CORRESPONDENCE AND WRITTEN APPROVALS:

All notices, correspondence, and written approvals pursuant to this Agreement shall be sent by the parties via express mail, commercial overnight courier, or confirmed facsimile, to the following address or fax number:

IF TO MANION:

Patrick T. Manion
3983 Pine Point Road
St. Cloud, Minnesota 56303
Fax Number: (612) 253-9946

IF TO BOAT DEALERS' ALLIANCE:

Boat Dealers' Alliance, Inc.
3983 Pine Point Road
St. Cloud, Minnesota 56303
Fax Number: (612) 253-9946

or to any other address or authorized person, or facsimile number, provided that prior written notice is given to the other party with respect to any change in this information. In the event that any notice, correspondence or approval is sent via facsimile, such message is effective upon confirmation of the facsimile, provided that a copy of the message also is sent via express mail or courier pursuant to this section. Additionally, if notice is sent by MANION, he shall provide identical service to the then President of BDA at his/her

regular business address or fax number, in addition to notice to BDA.

IN WITNESS that this agreement has been accepted by MANION and by BDA, and is binding on each of them, each has signed (and BDA has sealed) and dated this Management Agreement as set forth below.

Patrick T. Manion, Jr.	Boat Dealers' Alliance, Inc.
/s/_____	/s/_____
	Robert Soucy
Date: 3/17/96	Date: 3/12/96

APPENDIX K

EXCERPTS
BOAT DEALERS' ALLIANCE, INC.
BY-LAWS

ARTICLE VI

DUES, ASSESSMENTS AND PENALTIES

Section 1. A majority of all the stockholders voting may from time-to-time, determine the rate of monthly dues or other periodic or special dues, fees, charges, or assessments to be paid by the Members to assist in the financing the operations of the corporation. Such dues, fees, charges, or assessments may be uniform as between Members, or may be based on the size of the Member's business, the Member's trading territory, population, or potentials, the volume of sales of the Member to national or regional accounts, or classes of sales, purchases, or such other criteria as may be determined, provided that if several classes of membership are defined or determined based on such, or such other criteria, the dues, assessments, or charges levied or assessed on all respective Members of any one class shall be equal.

(a) Base monthly dues for all Members shall be $400. Such base dues shall be used by the corporation to run its office and to fund operations.

(b) Commencing in the year 2001, the Board shall have the discretion to refund dues in excess of one hundred and ten percent (110%) of operating expenses, in

any year in which dues exceed by at least ten percent (10%), the prior three year average of the corporation's operating expenses and dues.

Section2. Without limiting the generality of the foregoing, the Board of Directors may assess or levy special charges or fees on all purchases by Members from or through the corporation. Such charges or fees need not be uniform between the Members, but must be based on criteria uniformly applied to all Members, based on services rendered or value received.

(a) All purchases through the corporation shall be subject to a service charge of .003%. This nominal service charge shall be used by the corporation to run its office and to fund operations.

Section 3. Penalties:

(a) The Executive Committee may establish penalties of uniform application against Members which violate procedures established by the corporation; provided, however, the Board of Directors specifically must approve the penalty and notice of such penalty, and the procedure to which it is to apply must be given by the corporation in writing by certified United States mail, return receipt requested, by traceable overnight courier delivery, or by confirmed electronic mail, not later than ten (10) days prior to the date such procedure is to be complied with by the Member, unless it would be unreasonable to expect a Member to comply within such time period, in which event such longer period of time as determined by the Executive Committee shall be specified.

(b) Any such penalties may be established by the Executive Committee either as a specified dollar amount to apply equally to all Members, or as a percentage of some dollar amount, which amount, but not the percentage, may vary between Members, provided it is reasonably related to the procedural violation to which the penalty is to apply. Unless the Executive Committee specifies otherwise, any penalties established by it shall remain in effect until rescinded by it, or by a majority vote of the BDA Common stockholders. The corporation may deduct any such penalties from any funds otherwise due from the corporation to a penalized Member, or require that promotional allowances be applied to pay any such penalties.

(c) Any penalty assessed by the corporation may be appealed to the Board of Directors by the penalized Member. Notice of any such appeal shall be made in writing by the penalized Member to the President of the Corporation, with a copy to the applicable Executive Director, generally outlining the circumstances which led the penalized Member to believe that such penalty was unfairly assessed against it. The Directors shall hear such appeal at their next scheduled meeting, unless a delay is requested by the penalized Member; and a representative of the penalized Member shall be allowed to appear before the Directors for the purpose of discussing the assessed penalty. Any such notice of appeal shall not delay implementation of the penalty, and the Directors only shall act favorably in respect to any such appeal when the facts indicate that the violation was practically unavoidable by such penalized Member due to circumstances which make such appealed penalty grossly unfair as it was applied to such Member.

(d) Pursuant to Article X, Section 2(g)(1), below, a Member may have any or all of its rights, powers, privileges, options, or purchases, temporarily suspended by the Executive Director, in consultation with the President (or in his/her absence with a majority of the Executive Committee), in addition to or in lieu of any penalty otherwise provided for by the. By-Laws.

ARTICLE VII

PATRONAGE DIVIDENDS TO BDA MEMBERS

Section 1. Each BDA Member shall be deemed to hold "membership" in BDA within the meaning of the term "Membership" as used in Section 1388(c)(2)(B) of the U.S. Internal Revenue of 1982, as amended.

Section 2. There shall be distributed on a patronage basis to such Members of the corporation in a manner taking into account the amount of business done by BDA with each of them, all the net savings and overcharges effected by or resulting from the operations conducted and carried on by BDA in connection with the sales of marine equipment and non-disposable marine supplies made by BDA to such Members for resale by them which remain after paying all operating and administration expenses of BDA and all interest on its indebtedness and after the setting aside by the Executive Director (with approval of the Board of Directors) of such reasonable reserves as he/she shall determine from time-to-time to be appropriate, for the purpose of insuring the safety and welfare of BDA and for the purpose of providing for the expectancy of any losses or contingencies. Said distributions shall be made no later than eight and one-half(81/2) months following the close of the year of the corporation during which the patronage occurred with respect to which each such

distribution is made. In no event shall less than twenty percent (20%) of the total patronage distributions made each year to each Member be distributed in cash. The remaining portion shall be distributed in cash or in written notices of allocation (as defined in Section 1388 of the U.S. Internal Revenue Code. as amended) in whatever proportions shall be determined each year by the Board of Directors.

Section3. Notwithstanding the foregoing, every such Member on becoming a Member, regardless of whether it is an associate or a stockholder, authorizes and directs that all net savings of every character effected by BDA which are distributable to such Member, to the extent of the excess thereof over the twenty percent (20%) minimum portion of such distributable amount required to be distributed in cash, may first be applied by BDA to the payment of any indebtedness owed to BDA by such Member. The balance of any such act savings not so applied shall then be distributed as patronage dividends in the manner set forth in Article VII, Section 2, of these By-Laws.

Section 4. Each Member by accepting membership in BDA shall by such act alone consent that the amount of any distributions with respect to its purchases of marine equipment or non-disposable marine supplies for resale from BDA, or other patronage, which are made in written notices of allocation (as defined in Section 1388 of the U.S. Internal Revenue Code, as amended) and which are received by such Member from BDA will be taken into account by the Member at the stated dollar amount in the written notices of allocation in the manner provided in Section 1385(a) of the U.S. Internal Revenue Code in the taxable year in which such notices of allocation are received by said Member. The term "written notice of allocation" as used in these By-Laws shall be deemed to include, but not to be limited to, a letter of advice

to a Member that discloses to such Member an amount that BDA has elected to apply against indebtedness owed to BDA in accordance with the first sentence of Article VII, Section 3, of these By-Laws.

Section 5. The aforesaid written notices of allocation shall be redeemable by BDA in cash or in marine equipment and/or non-disposable marine supplies for inventory at the discretion of the Board of Directors. Any such written notice of allocation may also be applied by BDA at any time as an offset against the amount of indebtedness owing at any time to BDA with respect to any supplies sold by BDA and delivered to or on behalf of any Member. BDA shall have a first lien upon any written notice of allocation held by any Member, to secure the payment to BDA of any indebtedness owing at any time to BDA by such Member.

Section 6. Notwithstanding any of the foregoing provisions, the portion of any patronage dividends that would otherwise be distributable in cash under any provision of this Article VII to a Member which has been canceled or terminated by any means or for any reason whatsoever prior to the time of distribution of such patronage dividends, shall be applied by BDA to the payment of any indebtedness owed to BDA by or on behalf of such Member to the extent of such indebtedness instead of being distributed in cash, provided, however, that an amount equal to 20% of the total patronage dividends distributable for the applicable year to any such Member with respect to such Member's patronage shall nevertheless be paid in cash within 8-1/2 months following the close of such year if a timely written request for the payment of such amount in cash is submitted to BDA by the canceled or terminated Member.

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